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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 957

ROBERT SOBLEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. .....

ROBERT SOBLEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Robert Soblen respectfully requests a writ of certiorari to the Court of Appeals for the Second Circuit to review a judgment of that Court, which (1) affirmed a judgment of the District Court for the Southern District of New York convicting Petitioner of conspiracy to commit espionage and sentencing him to life imprisonment, and (2) affirmed an order of the District Court denying Petitioner's motion for a new trial on the ground of newly discovered evidence.

The Opinions Delivered in the Courts Below.

The opinion of the District Court, at the sentencing of Petitioner is reported at 199 F. Supp. 11, and is printed as Appendix D to this petition pp. 65a-68a. The opinion of the District Court denying the motion for a new trial is not yet reported. It is printed as Appendix A to this petition pp. 1a-54a. The opinion of the Court of Appeals has

not yet been reported; it is printed as Appendix B to this petition pp. 55a-63a.

Jurisdiction.

The judgment of the Court of Appeals sought to be reviewed was made and entered March 13, 1962. It is printed as Appendix C to this petition p. 64a. On April 6, 1962 an extension to May 12, 1962 of the time within which to petition for a writ of certiorari was granted by order of Mr. Justice JOHN M. HARLAN of this Court.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

The Questions Presented for Review.

1. Whether the Constitutional demands of Due Process required the Government in submitting the testimony of Jack Soble, its principal witness (and Petitioner's brother) to inform the jury that Soble was almost completely insane, and that he was suffering from a progressive organic brain disease that affected his memory, and that he suffered in addition from a serious psychiatric disorder.

2. Whether the Petitioner was entitled to a new trial upon the ground of newly discovered evidence and in the interests of justice, when he discovered subsequent to his conviction

(a) that vital testimony against Petitioner (to the effect that he received from Dr. Hans Hirschfeld information relating to the OSS) had been contradicted by Dr. Hirschfeld's testimony given before a federal grand jury;

(b) that the prosecution withheld information that Dr. Hirschfeld was a prominent West German Government official and deliberately misrepresented

its knowledge of Dr. Hirschfeld's residence and availability;

(c) that the prosecution withheld evidence that Jack Soble, the main witness against Petitioner was insane, and that he was suffering from a progressive organic brain disease, and that he was also suffering from a grave psychiatric disorder.

3. Whether the Trial Court committed prejudicial error in permitting testimony of hearsay statements and declarations implicating Petitioner of complicity in the conspiracy, that were made by the alleged co-conspirators Soble, Fedotov and Zubilin after the termination of the conspiracy.

4. Whether the Trial Court committed prejudicial error in permitting alleged co-conspirators to testify concerning Petitioner's conduct and their own conduct unrelated to the conspiracy, that occurred prior to the alleged conspiracy (in some instances more than 20 years before the alleged conspiracy began) and after the termination of the alleged conspiracy.

5. Whether the evidence purporting to show that Petitioner and others attempted to secure information about Trotskyites, Mensheviks and German civil servants was sufficient to sustain the verdict of guilt of conspiring to secure and transmit information "respecting the national defense", in violation of Title 18 U. S. C. Sections 793 and 794.

6. Whether the charge that Petitioner conspired to *obtain* information connected with the national defense (set forth in the First Count of the indictment) was barred by the statute of limitations and whether the submission

to the jury of the barred count and evidence relating to it was prejudicial error requiring reversal of the conviction of the charge that Petitioner conspired to *transmit* national defense information to the Soviet Union (set forth in the Second Count of the indictment).

7. Whether Petitioner was deprived of rights guaranteed by the Fifth and Sixth Amendments to the Constitution by the Trial Court's conduct in (1) compelling Petitioner to proceed to trial with newly-retained and wholly unprepared trial counsel (2) compelling Petitioner who was suffering from leukemia to proceed to trial at a time when he was not in a physical condition to stand trial or to make decisions with respect to his defense (3) refusing at the close of the People's case to grant Petitioner who was not then in a mental or physical condition to make a decision, an over-night adjournment to decide whether he should testify on his own behalf (4) by withholding from defense counsel at the trial and on the motion for a new trial, relevant medical reports and FBI reports.

Constitutional Provisions and Statutes Involved.

The constitutional provisions involved are the Fifth and Sixth Amendments to the United States Constitution. The statutes involved are Title 18, U. S. C. §§793 and 794 (1958); the Act of June 25, 1948, Ch. 645, Pt. II, Ch. 213 §3282, 62 Stat. 828;* and the Act of September 23, 1950, Ch. 1024, §19, 64 Stat. 1005, the pertinent portions of which are reproduced in Appendix E to this petition pp. 69a-72a.

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* Enacted as § 3282 of Title 18, U. S. C. (1948 ed.). The present § 3282 of Title 18, U. S. C. was enacted in 1954.

Statement of the Case.

Petitioner, an American citizen, was indicted November 29, 1960 by a federal grand jury in the Southern District of New York. The First Count of the indictment charged a conspiracy to obtain information relating to the national defense of the United States; the Second Count alleged a conspiracy to transmit such information to the Soviet Union. Eighteen persons were named in the indictment as co-conspirators but only Petitioner was made a defendant.

This statement of the case is of necessity based on the testimony of the witnesses for the prosecution. The substance of the Government's case is set forth here as if true though the two main witnesses for the prosecution are at best unreliable and some of their testimony is incredible and some of their testimony is patently false.

It is claimed that the unlawful agreements to obtain and transmit national defense information were entered into in 1940 and continued (according to the indictment) to 1956. Jack Soble, who as shall later be shown was almost completely insane at the time of the trial, testified that the agreement to commit espionage was made in Moscow between himself and Lavrentia Beria, head of the Russian secret police (R. 329-31, 1740, 1742).* It is not claimed that Petitioner was present at the meeting.

Soble's account of his understanding with Lavrentia Beria strains credulity and is obviously the product of a

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* The Court of Appeals granted Petitioner leave to dispense with a printed appendix and to file a partial appendix. References to the pages of the Record on Appeal are indicated as follows: (R. . . .). Record pagination of all portions of the Record on Appeal other than the stenographic transcript of the testimony given at the trial, is set forth at the *lower* right corner of each page. Record pagination of the stenographic transcript of the testimony given at the trial (R. 1-1739) is set forth at the *upper* right corner of each page.

disordered mind. According to Soble, Beria agreed to allow Soble and his family to leave Lithuania and stated that in return "he would like" Soble and Petitioner to "go abroad" and "gather any information of value to the Soviet Union" (R. 329, 331). Nothing was said about the place where Soble was to go (the emigration to the United States was not planned); nothing was said about the kind of information to be obtained or the manner in which it was to be secured. No reference whatever was made to the United States or to information relating to the national defense.

Soble testified that when he, the Petitioner and their families finally arrived in America he met Zarubin (also known as Zubilin) a Secretary at the Russian Embassy, and one of the main co-plotters. At that time, according to Soble's testimony, the general suggestion made by Beria was given definite form. Soble testified to the following conversation at his meeting with Zarubin (R. 368-369).

> "A. Yes, right away. I mean, without any preparation, he said that "You came to America. I know the whole case about you. You came and your brother Robert came to America. You took out all your relatives, your parents, sisters, and we gave you everything you wanted. I mean, the family is now safe and we want you to keep to the other part of the agreement to work for us.
>
> Q. Did he say anything else to you at that time? A. He said, that is, Zarubin said that, as you understand, there is a war going on "—because there was already going on the war between Russia and Germany at that time—" *and we are allies with America and you have to help in the common general effort and you will work for us and gather any information you can.* (Emphasis ours.)

There was no evidence of any other communicated agreement or understanding between the alleged conspirators and no evidence of any conduct from which a plan to secure or transmit defense secrets can be inferred. According to the testimony the alleged conspirators attempted thereafter to secure information about Trotskyites and Mensheviks, their attempts to infiltrate unions and their attempts to form a common-front against the Stalinists within the radical movement (R. 385, 410, 425, 657, 659-60, 669-70, 675-679). One other area of interest was the political activities and affiliations of German civil servants, some of whom were living in the United States and others in Germany (R. 1195, 1197, 1202-1203).

There was no evidence of interest in or attempt to secure information about armed forces, instruments of war, army or navy installations, aircraft, vessels, military codes, defense plans or any other object enumerated in Sections 793 and 794 of Title 18 of the United States Code. On the contrary, the main witness Soble testified that the information sought had no relation to national defense (R. 669-670).

There is also very little direct evidence in the record with respect to any activity of the Petitioner either alone or in concert with his alleged co-conspirators. The only time it was claimed Jack Soble and the Petitioner worked together was in the late spring or early summer of 1945. Soble testified that at that time he intended to leave New York and transferred his "contacts" namely Lucy Booker and Floyd Miller to Petitioner (R. 433-435). There was no testimony with respect to any meeting or transaction between the Petitioner and Miss Booker. Her sole contribution to the alleged conspiracy was to allow her apartment to be used by Soble "as quarters in which the Trotskyite material is being typed and being done" (R. 424-424A, 862-863). Miller's dealings with the Petitioner were

completely innocent. Miller testified that at the time he met the Petitioner he was attempting to get a job as a newspaperman in Europe. The only communications between Miller and Petitioner, during the six months that they met, were on the subject of Miller's lack of success in securing work (R. 1047-8).

The only other person who testified with respect to the Petitioner's alleged conspiratorial conduct was Johanna Beker. Mrs. Beker stated that she received reports from two persons, Dr. Horst Baerensprung and Dr. Hans Hirschfeld, and that she transmitted those reports to Petitioner from 1943 to the early summer of 1945 (R. 1201, 1202). Dr. Baerensprung was described to Mrs. Beker as "a Social Democrat from Germany . . . doing much work with German refugee groups in America" (R. 1194). Baerensprung's reports were "of meetings of groups of Germans then living in the United States, their possible plans for party affiliations, and work in Germany after Hitler might be defeated" (R. 1195) and "on group meetings and drawing up of manifestos and plans of anti-fascist groups . . ." (R. 1204).

Mrs. Beker claimed that Dr. Hirschfeld, then employed in the Biographical Records Unit of the OSS (R. 2490), also furnished "biographical sketches of Germans, and, again a report of groups of Germans" (R. 1197). She testified further that in the spring of 1945 two or three of Dr. Hirschfeld's reports contained a statement that he had learned in his office (The Biographical Records Unit) that the United States Government was working on some "important military project and making great progress with it and this would decide the end of the war considerably" (R. 1207-1208). The reports, according to Mrs. Beker, stated that the military project was being devel-

oped in a locality in the northwest of the United States (R. 1208).

The OSS unit where Dr. Hirschfeld worked, as Petitioner learned after he was convicted, was employed merely in collating data secured from the public library and newspapers (R. 2490-2491, 2078). It was a unit of the Research and Analysis Branch of the OSS and its work was to secure biographical data about German civilians and civil servants, so that after Germany was conquered we "would know with whom to deal" (R. 2511, 2078). The persons employed in that unit were not given access to secret material for they were not American citizens (R. 2531) and that office of the OSS did not receive any information about military projects, defense measures or the development of weapons (R. 2492, 2493, 2512, 2534, 2078).

According to the testimony offered by the Government the alleged conspiracy ended in 1945. The meetings between the alleged conspirators ceased before the end of 1945 (R. 929), and before the end of that year the alleged conspirators dispersed and either left the country or ended their work in connection with the conspiracy, and the common plan was abandoned. Soble testified that the Zubilins,—the hub of the conspiracy,—left the United States in 1944 (R. 915); Chaudenko, Petitioner's alleged superior, left America before the end of 1945 (R. 929); Chaliapin, another of the alleged conspirators left at the end of 1944 (R. 915). Mrs. Beker according to her own testimony ceased her activities in 1945 (R. 1209-10) and Floyd Miller finished his part in the conspiracy in the early winter of 1945 (R. 1033). The Petitioner's alleged conspiratorial conduct also ended, according to the prosecution's witnesses, in 1945 or at the latest in 1946 (R. 465-6, 1209-10, 1537-8).

Although many "overt acts" said to have occurred after 1945 were set forth in the indictment, the Government relied

in the court below on only two overt acts that the Government contended, took place after 1945. One of the "overt acts" the Government contended was the Petitioner's "act" of advising his brother Soble, during the period from 1952 to 1956 to leave the country (R. 462-465). The second overt act relied on by the Government as proving a continuance of the conspiracy after 1945 was Soble's transmission of information to Borris Morros in 1954 (R. 962). Morros was not one of the original conspirators and Soble testified that in 1954 he had lost faith in the communist movement and was attempting to mislead Morros, not to work with him (R. 962-967).

At the time of the trial the defense knew or elicited on cross-examination certain facts relating to Soble's mental state. The Petitioner was then aware that Soble attempted suicide in 1958 by swallowing a large quantity of nuts and bolts; that he had been under observation at Bellevue in 1957, and that he was given twenty electro-convulsive shock treatments in 1958 and 1959 (R. 591-8). The Petitioner and the jury were thus informed that Soble had suffered from mental illness (R. 591-8). The true state of Soble's mental condition, however, was not discovered by the defense until after the trial. It was then discovered that Soble had been suffering from a progressive organic brain disease and in addition from a severe mentally disabling depression described as an involutional psychotic reaction. It was also learned that as a result of the organic impairment, Soble's memory was affected and that he might in his testimony have substituted imagined occurrences for real ones, without realizing that he was doing so (R. 2282-2284).

On the motion for a new trial, Petitioner produced a transcript of the testimony of Dr. Donald B. Rinsley, a psychiatrist at the Menninger Foundation, who treated

Sobble in 1958 at the medical center of the federal prison in Springfield. Dr. Rinsley's testimony, offered on the motion for a new trial, was in part as follows:

(R. 2282-2284):

"Q. Did you at any time form an opinion as to whether in the light of that diagnosis Jack Sobbe was capable of telling the truth? A. Yes, sir, I did.

Q. What was that opinion? A. The opinion was that he is capable of telling the truth. *If I may add to that, Sir?*

Q. Yes, you may. A. That one of his difficulties has been difficulty with memory, and that one could expect that at times because of a deficiency in memory, *and because of the nature of his mental illness, he is capable of filling in his gaps in memory with information which he believes to be true but which may not be true.*" (Emphasis ours.)

(R. 2286-87):

"Q. . . . Dr. Rinsley, could you state where on the ladder of mental illnesses in regard to seriousness, Jack Sobbe's mental illness would be found? In other words, how sick is Jack Sobbe. A. Well, I would like to answer that two ways, if I may.

Q. Surely. A. The first way would be by saying that, as I recall him and from my studies of him, I would have to say that Mr. Sobbe's mental illness is of the moderate to severe degree, and if I may, if we have the scale of zero to 10 and 10 is the worst, if you will, and zero is the least, I would place him about 7, perhaps 7½, perhaps 8. In other words, he is well along on this seriously ill side. He is much more seriously ill than he realizes".

Mrs. Beker, it will be recalled, testified that Dr. Hirschfeld submitted information gained from his office in the

OSS "that the United States was working on some important military project" in the northwest and that great progress was being made with the project (R. 1207-8). The Dr. Hirschfeld referred to by Mrs. Beker was not known to the defense (R. 1982, 1954). His identity was not disclosed during the trial and the prosecuting attorney led the defense to believe that Dr. Hirschfeld was not available to answer Mrs. Beker's accusations. At the close of the Government's case there was the following colloquy between the Court and chief counsel for the prosecution:

> The Court: Well, specifically where is Hirschfeld?
>
> Mr. Casey: *I don't know of my own knowledge. I believe he is in West Berlin.*
>
> The Court: In West ——
>
> Mr. Casey: *West Berlin, but I am not sure.*
>
> The Court: Would Mr. McCarthy know?
>
> Mr. Casey: I was told by a newspaperman that he was in West Berlin *this week.* He was interviewed there this week by a newspaperman I believe in West Berlin.
>
> The Court: All right.
>
> Mr. Casey: *I don't know where he is living. He could be living in the East, but I don't know"* (R. 1425-1426) (Emphasis ours.).

The denial of knowledge of Hirschfeld's place of residence was misleading, if not false. The Dr. Hirschfeld referred to in Mrs. Beker's testimony is a person of prominence in West Germany. He was an aide to Willy Brandt, Mayor of West Berlin, and was Chief of the Chancellery of the Senate of West Berlin (his title being that of Senatsdirektor). His name, address and telephone number are in the German Who's Who (R. 1968-9, 1973). The Government did not have the slightest difficulty in locating

Dr. Hirschfeld on a number of occasions when it wanted to communicate with him or have him testify before the grand jury in New York. (R. 2309-2312, 2320, 2336, 2346, 2461-2462, 2571, 2574; Mot. Ex. for id. A, H, K, L, M, Y, Z, AA)*.

When interrogated by the FBI, and again when he appeared before the federal grand jury in 1960, Dr. Hirschfeld categorically denied that he had ever turned over any secret material, or defense material, or information secured from the OSS to Mrs. Beker or to anyone else. He denied that he had ever seen Mrs. Beker before she was brought to West Berlin to "confront" him; and he denied that he ever received or had any knowledge of atomic weapons or secret military projects. All of that evidence contradicting Mrs. Beker was, of course, in the Government's possession during the course of the trial (Mot. Ex. for id. H, K, L, M, X, Y, Z, AA).

The Government had other evidence from completely impartial persons contradicting Mrs. Beker's testimony to the effect that Dr. Hirschfeld in an account of "activities in his office" (The Biographical Unit), reported that the "United States Government was working in some important military project" (R. 1207-1208). The Government had interrogated Hirschfeld's former colleagues in the OSS and the substance of their testimony was that neither the Biographical Records Unit or Dr. Hirschfeld had access to secret information or information relating to weapons or military projects (R. 2489-2495, 2509-2512; Mot. Ex, for id. N, O, P, Q, R, S, BB).

At the time of the indictment Petitioner was suffering from leukemia, a fatal disease commonly known as cancer

* References to the Exhibits for Identification introduced at the hearings on petitioner's motion for a new trial are indicated as follows: (Mot. Ex. for id.).

of the blood. When the case was reached for trial Petitioner's physical condition had deteriorated and he could not proceed without sedation and the administration of drugs (R. 14, 15). He sought a postponement of the trial but without success.*

At the conclusion of the People's case, Petitioner asked for an over-night adjournment because he was not in a physical or mental state to decide whether he should testify in his own defense (R. 1466-1467). The Court refused an adjournment for that purpose (R. 1469-1474), and Petitioner did not take the stand.

The case then went to the jury, which rendered a verdict convicting Petitioner upon both counts (R. 1633). At the time of sentence Petitioner asked for a deferment of sentence pending disposition of a proposed motion for a new trial on the ground that he and the Trial Court had just been informed by Professors Herbert Marcuse of Brandeis University and H. Stewart Hughes of Harvard University (the latter a grandson of former Chief Justice Hughes) that the work of the Biographical Unit had no connection with national defense (R. 1671-1674). The Trial Court declined the request and imposed a sentence of ten years upon the First Count and life imprisonment upon the Second Count of the indictment (R. 1686, 1720, 1799).

Reasons For Allowance of The Writ.

1. ***The prosecution's failure to inform the Jury that its principal witness was insane, and that his memory had been affected by a brain disease, constituted a denial of due process.***

* The Stenographic transcript of the hearings on Petitioner's application to stay the trial and the Order of Judge William B. Herlands denying that application are not included in the record on appeal. They were missing from the files of the United States District Court for the Southern District of New York (R. 1938).

The Government's case against Petitioner rested upon the testimony of Jack Soble, the Petitioner's younger brother. There is a serious question in a capital case with respect to the Government's right to present as its principal witness a person suffering from an organic brain disease. We do not believe that the testimony of such witness may be offered in any event without a full disclosure of his condition. The testimony of such witness is at best unreliable and dangerous. The danger is greatly increased in a conspiracy case where the ordinary rules of evidence do not apply and the witness, if he claims to be a co-conspirator, is permitted to testify about his own acts and statements and those of others, made or performed in the defendant's absence and without his knowledge. It is usually impossible to show the falsity of such testimony either on cross-examination or by direct evidence. The mere fact that such witness is *capable* of telling the truth is not a justification for presenting his testimony without revealing the facts necessary for a judgment of the reliability of the testimony. The fact that the witness is capable of fabricating without being aware of it should preclude the introduction of his testimony or require that it be introduced only after the jury has been fully apprised of the nature of the witness's mental disabilities.

At the time Soble's testimony was offered, he was a prisoner of the Federal Government. He had pleaded guilty of conspiracy to commit espionage, against his attorney's advice because, in his language:

> "I committed a crime because I lied to this Government. I came on the visa, having already falsified my questionnaire and not having answered if I was a Communist or not a Communist; what do you call lies and what do you call truth, Mr. Brill, in your career? I could have had a brilliant career here, dur-

ing the war when there was a heavy demand for people who spoke the German language.

I was afraid of applying for a job because I was afraid of the FBI.

Do you understand that I committed crimes? That is why I kept away. That is why I am shouting. I am glad that I am serving even this term because it showed me the way to truth" (R. 673-4).

* * * * * * *

"A. Don't you understand that? Don't you understand that an active Communist who is coming to this country and he lies right in the first questionnaire and he denies his past record, don't you understand that he is afraid of the truth coming out? I cannot understand your legal mind, even" (R. 682).

Before testifying against his brother the Petitioner, Soble was subjected to interviews with the FBI on at least 76 different dates on each of which virtually the same ground was covered (R. 497-506, 511-541, 563-571, 720, 727, 980, 988-1005; Tr. Ex. for id. 20-111, 117-125*). To subject a witness of such suggestibility to so great a number of rehearsals of the same story is at best, of doubtful propriety. The situation was not ameliorated by the closing address of the prosecuting attorney in which he referred to Soble's "fantastic memory" as proof that he was a trained professional spy (R. 1549). The prosecuting attorney failed in commenting on Soble's memory to advise the jury that Soble had been "reminded" of the "facts" on so very many occasions. Such conduct is not consistent with our traditional concept of fair trial and due process of law.

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* References to the Exhibits for Identification offered at the Trial are indicated as follows: (Tr. Ex. for id.....).

2. *Petitioner's motion for a new trial should have been granted both on the ground of newly discovered evidence and in the interests of justice.*

The two witnesses who testified to the Petitioner's alleged part in the conspiracy were Soble and Mrs. Beker. As previously shown, the Government withheld testimony showing that Soble because of his brain disease may not have known whether his own testimony was true or fabricated. It also withheld information that Mrs. Beker, a confessed perjuror (R. 1318-1336) had been directly contradicted before the Federal Grand Jury by Dr. Hirschfeld, a prominent, highly respected person, and that doubt had been cast upon that part of Mrs. Beker's testimony that the government considered most significant, by the statements of Dr. Hirschfeld's colleagues in the OSS.

Petitioner's counsel was not aware (a) that governmental medical reports existed showing that Jack Soble was suffering from an organic brain disease (R. 2282-3), (b) that Hans Hirschfeld had testified before the grand jury and had repudiated Mrs. Beker's testimony (R. 2309-10, 2461-2462; Mot. Ex. H for id.), (c) that the prosecuting attorney was misleading the Court in stating that he did not know where Hirschfeld lived and in suggesting that Hans Hirschfeld might be living in East Berlin and was therefore unavailable (R. 1425-6), (d) that Hans Hirschfeld was *in truth a very* well known, reputable West German official living in West Berlin, and (e) that Mrs. Beker's testimony that Dr. Hirschfeld secured information about the existence of a military project from his office was contradicted by the other persons employed in the same office (R. 2489-2495, 2509-2512; Mot. Ex. for id. N, O, P, Q, R, S, BB).

It should be noted here that the Government claims that it gave to Petitioner's trial attorney several parts of state-

ments that showed that Hirschfeld had on another occasion confronted Mrs. Beker in the presence of FBI agents and denied her accusations. However, defense counsel denied receipt of that information. In any event there is no claim that the information outlined in the preceding paragraph had been given to the defense.

The Court below, in discussing the medical report of Soble's mental illnesses, suggested that the prosecution's duty on its own initiative to disclose "exculpatory facts within its exclusive control" does not exist "when the facts are readily available to a diligent defender." (App. 62a*) We do not agree that in a capital case the Government may remain silent, counting upon the ability of defense counsel to ferret out facts known to the government that would tend to prove the defendant's innocence. The requirement that a defendant shall have shown diligence in the search for exculpatory evidence is not stressed by the courts where there has been such suppression of evidence by the prosecutor or the court as to constitute a denial of due process. *United States* v. *Dye*, 221 F. 2d 763 (3d Cir. 1955); *Delbridge* v. *United States*, 262 F. 2d 710, 712 (D. C. Cir. 1958); *Arbuckle* v. *United States*, 146 F. 2d 657, 660 (D. C. Cir. 1944).

The possibility or probability that more diligent defense counsel could have discovered some of the exculpatory evidence during the course of the trial, is in any event not decisive of the question under discussion. The issue is not the competence or ability of Petitioner's trial lawyer, but whether justice has been done, and in this case a negative answer must be given.

We believe it is the rule, though it has not been honored in the observance, that the government may not withhold

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* References to the pages of the Appendix to this petition are designated (App.....).

evidence bearing on the credibility of a witness it places on the stand. The failure to notify a defendant of the existence of evidence that would tend to show his innocence is tantamount to the suppression of material evidence, and requires the reversal of a conviction, *Berger* v. *United States* 295 U. S. 78, 88 (1935); *Wilde* v. *Wyoming* 362 U. S. 607 (1960) and see comment: New Trial Granted Because of Prosecution's Negligent Failure To Disclose Evidence Useful to Defense, 62 Colum. L. Rev., 526 (1962).

In the instant case the Government was not only guilty of withholding exculpatory evidence but of adopting a stratagem and of presenting evidence in such way as to deliberately deceive the jury and the defense. The prosecuting attorney presented evidence through the testimony of Otto Charles Doering Jr., formerly Chief Executive Officer of the Office of Strategic Services, that the purpose of the organization was to secure and analyze strategic military information needed by the Joint Chiefs of Staff. Doering also testified that the Biographical Records Unit was a part of the OSS (R. 1374, 1375, 1544), and that the identities of persons working on highly classified material was kept secret (R. 1377). Mrs. Johnson, archivist of the Strategic Services Unit testified that Baerensprung and Hirschfeld were employed by the Biographical Records Unit (R. 1370). Because of the government's failure to present any evidence relating to the function of the Biographical Records Unit the Jury and the defense were misled to believe that Hirschfeld was employed in a highly secret intelligence agency,* from which he stole vital military information.

* In his opening statement to the jury the prosecutor referred to the Petitioner's alleged connection with the securing of reports from Hirschfeld as an assignment "in the very heart of our own intelligence agency" (R. 240). The Biographical Records Unit is also described in the summation as an "Intelligence Agency" (R. 1545).

that was transmitted to the Petitioner. To prevent the correcting of that impression, which it knew to be false, the Government withheld from the defense the contradictory proof in its files. As Mrs. Hepner, Dr. Hirschfeld's assistant at the OSS, and Mrs. Stone, Administrator of the unit, testified on the motion for a new trial, the Biographical Records Unit had no access whatever to secret material or material of a military nature, and Dr. Hirschfeld's work in the Biographical Records Unit was to collate data obtained from the newspapers and public library at 42nd Street in New York City (R. 2509, 2531, 2490-93). Certainly the Petitioner's trial counsel cannot be held responsible for failing to suspect the Government of so unworthy a device, and of failing to call the witnesses who would have exposed it.

3. *The Trial Court committed prejudicial error in admitting hearsay declarations made by alleged co-conspirators after the conspiracy ended, that purported to show Petitioner's participation in the conspiracy.*

The Court below acknowledged that "the admission of hearsay testimony relating to conversations after 1945, particularly those between Jack Soble and various Russians in 1947" presented a question of serious error (App. 60a). As shown in the Statement of the Case, the alleged conspiracy terminated before 1946. The witness Soble testified that he went abroad after 1946 in order to make and establish new "contacts" for himself (R. 435-456A, 461-466). In addition to testifying about his own unsuccessful efforts to find new persons to work with in the years from 1946 to 1952 Soble testified to alleged conversations in Moscow in 1947 with Fedotov, and the Zubilins. Soble testified that in the alleged conversations that were supposed to have taken place in 1947 there were refer-

ences to Petitioner's earlier work and "contacts" in the United States, in which Petitioner's guilt of espionage was tacit and clearly implied (R. 431, 440-2).

At the close of the case the Jury was instructed to decide whether the conspiracy continued until after 1952 as the Government contended (R. 1605-1606). The Jury was also instructed that the statements and acts of co-conspirators were binding on Petitioner if they found that Petitioner participated in the conspiracy and if the statements and acts were in furtherance of the conspiracy (R. 1602). The conduct of Soble after 1945 could not, however, have been imputed to the conspiracy in which Petitioner was allegedly engaged because "there can be no furtherance of a conspiracy that has ended." *Lutwak* v. *United States*, 344 U. S. 604 at pp. 617-618 (1953). A conspiracy may not be deemed to be a continuing one unless there is "continuous cooperation of the conspirators to keep it up". *Fiswick* v. *United States*, 329 U. S. 211 at p. 216 (1946), *United States* v. *Kissel*, 218 U. S. 601, 607 (1910). The overt acts chargeable to Soble after 1945 were not in cooperation with any of the other alleged conspirators. His actions were not in concert with former co-conspirators and there was no evidence that the steps taken by Soble were within the contemplation of the parties.

The only conclusion to be drawn from the testimony presented by the government is that Appellant's alleged connection with the conspiracy ended in 1945 and that the conspiracy also terminated in that year. It is clear therefore that the admission of the post-1945 testimony was prejudicial error and that it was error to instruct the jury that Soble's post-1945 acts were binding on Petitioner. *Kotteakos* v. *United States*, 328 U. S. 750 (1946). It was also grave error to admit hearsay declarations by alleged co-con-

spirators made after the termination of the conspiracy, particularly when the declarations implicated Petitioner, *Krulewitch* v. *United States*, 336 U. S. 440 (1949).

The Court below reaffirmed the rule that "to admit hearsay of conversations after the conspiracy is over, is error" (App. 60a). The Court concluded however that the admission of the hearsay was not error in this case because "the jury must have found that the conspiracy continued past 1945 before it could consider the allegedly prejudicial testimony" (App. 61a). In the absence of any evidence to support such a finding, there was error both in the admission of the hearsay evidence and in the submission to the jury of any question predicated on the continuance of the conspiracy after 1945.

4. *The Trial Court committed error in permitting alleged co-conspirators to testify about their own conduct and Petitioner's alleged conduct unrelated to the conspiracy, that purportedly occurred many years before the conspiracy started and long after it ended.*

One of the witnesses, Floyd Miller, a writer of fiction (R. 1012) did not meet Petitioner or any of the alleged conspirators until 1944 (R. 1024-1026). However, he was allowed to testify about his agitational propaganda work for the Communist Internationale in 1936 (R. 1013-1014), about his wire-tapping for the Communist party in 1937 (R. 1017), about his infiltrating the Seafarer's International Union in 1941 (R. 1020-1021) and about his transmitting reports on seamen sailing to Murmansk in 1941 (R. 1021). Miller's only dealing with the Petitioner, it will be remembered, was to advise Petitioner that he (Miller) had been unable to get a job.

Mrs. Beker's testimony about her own past was more lurid, and prejudicial, and it too was completely

unrelated to the accusations against Petitioner. The conspiracy was supposed to have started in 1940. Mrs. Beker told of her marriage in 1935 to an American in Moscow (R. 1164), about her husband's working for the Russian Secret Police in 1937, about her husband's acting as an informer against his friends (R. 1166-1167), about her husband's abduction by the NKVD and disappearance in 1937 (R. 1168-9), about her working as a spy for the NKVD in Moscow shortly after her husband's abduction (R. 1169-1170), and about her acting as an informer for the NKVD against members of the American Embassy staff in Moscow in 1938 (R. 1172).

The Government also made extended reference to and introduced a great deal of testimony on the subject of Petitioner's and Jack Soble's alleged Communist Party affiliations in Lithuania, Germany and Spain *beginning in 1919*, more than forty years before the indictment was handed down in this case and more than twenty years before the inception of the alleged conspiracy (R. 233-238, 243, 266-323).* The testimony with respect to Petitioner's alleged activity in *1921* was summarized in the prosecutor's summation (without reference to the period of the activity) as follows: "He was so good (a Communist), he was made a member of the Referendum; he was a writer of the philosophy of the communist cause and conspiracy."** (R. 1532, 273-274) (matter in parentheses inserted). Evidence of communist affiliation "can be highly inflammatory in a jury trial" *United States* v. *Rosenberg*, 195 F. 2d 583 at p. 596 (2d Cir.) cert. denied 344 U. S. 838 (1952). Such testimony is admissible only when needed

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* The record is barren of any reference to political activity by Petitioner after the commencement of the alleged conspiracy.

** The writing was not produced.

to prove an essential part of the Government's case and even when there is such a need, the Court is obliged to balance the need against the obvious appeal of such evidence to the prejudices of the jurors. *United States* v. *Rosenberg*, 195 F. 2d at 596. In this case there was a clear abuse of discretion for the testimony in question was not pertinent to the Government's case and the Trial Court completely ignored its prejudicial effect.

Presumably the evidence of Communist Party membership and activity was offered to prove Petitioner's intent and motive in engaging in the alleged conspiracy (R. 1591). But no rational connection was or could have been shown between Petitioner's alleged membership in the Lithuanian Communist party in 1919, or his alleged advocacy of Communism in 1921, and a conspiracy in the United States in 1940, *Boijer* v. *United States*, 132 F. 2d 12, 13 (D. C. Cir. 1942). Here most of the testimony with respect to Petitioner's alleged communist activities related to a time so remote as to have no probative value on the issue of intent or on any other issue in the case. The tendency and indeed the purpose of the testimony was so clearly to create hostility against Petitioner that its exclusion would have been required even if there had been valid ground for its admission.

The testimony of the criminal actions and evil conduct of the other alleged conspirators unrelated to the conspiracy was detrimental to the Petitioner because as an alleged associate of the witnesses he was tarred with the same brush. As Mr. Justice Jackson put it, "it is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together" *Krulewitch* v. *United States*, 336 U. S. at p. 454 (concurring opinion). The testi-

mony of activities of the alleged conspirators after the conspiracy ended in 1945 was completely irrelevant and prejudicial particularly because of the cessation after that time of cooperation between the United States and the Soviet Union.

5. The Petitioner's alleged conduct did not relate to the national defense and was not within the scope of the statutes on which the indictment is based.

This case involves an important question with respect to the construction of 18 U. S. C. 793 and 794 and with respect to the permissible extension of the much criticized concept of criminal conspiracy. The genesis of the conspiracy was an alleged arrangement with Beria that had nothing to do with national defense or for that matter with the United States (R. 611-612). The principal witness to the making of the alleged conspiratorial agreement disavowed any intent to obtain information other than that relating to embroilments between various factions of the communist movement (R. 669-670).

In its opinion in this case the Court of Appeals said "(the quoted purpose (of the Beria agreement) certainly cannot reasonably be construed to have *excluded* the gathering of national defense information" (App. 56a) (emphasis ours). Upon a trial of a capital case the Government must do more than to present an innocuous agreement and to state that a possible later illegal construction was not precluded.

The Court below suggested that the alleged conspiracies related to the national defense because Petitioner secured information from a department of the OSS (App. 56a-63a). The mere fact that the Biographical Records Unit was a branch of the OSS could not affect the nature of the

material allegedly sought or received by the alleged conspirators. As Professor Hughes testified at the hearing on the motion for a new trial, the OSS had ten or twelve different branches (R. 2071). A "tight" wall was maintained in the OSS itself between those branches entrusted with secret material and those that were not (R. 2074). The Biographical Records Unit was a department of the Research and Analysis Branch, one of the "far-less-secret branches of the OSS" (R. 2072, 2074). The Research and Analysis Branch did not deal with or receive information relating to the war-effort of the United States (R. 2076) and the Biographical Records Unit had no access to secret material (R. 2531).

The case at bar cannot be distinguished from *United States* v. *Heine*, 151 F. 2d 813 (2d Cir. 1945) cert. denied 328 U. S. 833 (1946), which also involved materials culled from public sources that the Court found did not relate to the national defense. The reliance of the Court below upon *Gorin* v. *United States*, 312 U. S. 19 (1941) affirming 111 F. 2d 712 (9th Cir. 1940) was misplaced. *Gorin* v. *United States* was an appeal from a conviction of obtaining and conspiring to obtain reports from the files of a Naval Intelligence office. The reports turned over to Gorin were concerned with Japanese espionage activities in the United States. Gorin argued that since the reports that he secured dealt with Japanese espionage that had not been effective and contained no information relating to the armed forces, arms, or military equipment of the United States they did not relate to "national defense" within the meaning of the Espionage Act.

We think it clear that the situation presented in Gorin is not analogous to the one in the case at bar. Under the rule of the *Gorin* and the *Heine* cases the substance and

the availability to the public, of the information sought must be considered in determining whether a plot to secure information is a conspiracy to secure "national defense" data within the meaning of the Espionage Act. In the instant case it has not been shown that any of the information sought or secured by the alleged conspirators was secret or related to defense matters.

The sole item of information allegedly transmitted to Petitioner that had even a remote connection with "arms and equipment of the United States armed forces", to use the phrase of the indictment, was the alleged report delivered by Hirschfeld to Beker in the Spring of 1945. That report, it will be recalled, was said to relate to activities in Hirschfeld's office and was to the effect that "the United States Government was working in some important military project and making great progress with it and this would decide the end of the war" (R. 1207).

We have shown previously that the Government was aware that Mrs. Beker's testimony was not true. Moreover, statements to the effect that new weapons were being developed, were common street gossip during the period in question. Certainly the allies and the enemies of the United States were aware during the war years that the United States was attempting to develop new weapons. Statements to the effect that extremely effective new weapons had been developed were broadcast during that period by the German and Allied forces (R. 1944). In any event the alleged reference to a project somewhere in the northwest is so vague and indefinite that it could not possibly have been of use "to the injury of the United States, or to the advantage of any foreign nation" and therefore was not within the orbit of Sections 793 or 794 of the Espionage Law. See *Gorin v. United States*, 312 U. S. 19, 29-30 (1941).

Nor was the statement about the military project within the scope of the alleged conspiratorial agreement. Every witness who testified about alleged conspiratorial activities, including Mrs. Beker, spoke of attempts to obtain information regarding Mensheviks, Trotskyites and individual Germans and German political groups. If one member of a conspiracy to secure innocuous information secures secret military data and puts it into the conduit, the other members cannot be held guilty of a conspiracy to obtain such information. *United States* v. *Crimmins*, 123 F. 2d 271, 273 (2d Cir. 1941). No testimony was offered to show that the Petitioner or any member of the alleged conspiracy other than Hirschfeld (who is not named as a conspirator in the indictment) ever attempted, or intended, to obtain information about military developments. All evidence of intent was to the contrary.

6. Prosecution of the conspiracy to obtain national defense information, charged in Count 1 of the indictment, was barred by the Statute of Limitations. The submission to the jury of the barred Count was prejudicial error requiring reversal of the conviction of the charge of conspiracy to transmit national defense information.

The alleged conspiracies ended in 1945 or at the latest in 1946. At that time and until September 23rd, 1950 the applicable period of limitations was three years. Act of June 25, 1948, Ch. 645, Pt. II, Ch. 213, §3282, 62 Stat. 828.* Prosecution of the charge in Count 1 was thus barred in 1949 by the three year statutory period of limitations then in effect. By the Internal Security Act of 1950, Chapter 1024, §19, 64 Stat. 1005, the period of limitations for violation of 18 U. S. C. §793 was extended to ten years. The

* Enacted as § 3282 of Title 18, U. S. C. (1948 ed). The present § 3282 of Title 18, U. S. C. was enacted in 1954.

September 23, 1950 enactment did not by its terms have any effect on cases already barred by the Statute. But prosecution of the offense charged in Count 1 is barred even under the ten year statute because the conspiracy terminated fourteen or fifteen years before the indictment was filed in November 29, 1960 (R. 1663).

The Court below recognized that "whether or not prosecution under Count 1 was barred presents a serious question". It declined to determine that question because it said, referring to the fact that Petitioner had been sentenced to life imprisonment on the Second Count, that "The sentence imposed on count 1 did not increase defendant's term of imprisonment" and there was "no proof with respect to count 1 which was not equally admissible with respect to count 2" (App. 78a).

We believe the Court erred in assuming that all the testimony with respect to Count 1 of the indictment had also been offered or would have been admissible with respect to Count 2. We believe the Court also erred in assuming that it was not prejudicial error to submit to the jury the question of Petitioner's guilt on a charge that had been barred. *See Flemister v. United States*, 260 F. 2d 513 (5th Cir. 1958) and *United States v. Siebricht*, 59 F. 2d 976 at 978 (2d Cir. 1932).

Moreover, the testimony concerning the "important military project" that the Government considered critical, was admitted presumably, with respect to the charge of conspiracy to *obtain* defense information* for it was not under any tenable theory admissible with respect to the charge, in the Second Count, of conspiracy to *transmit*

* On the theory as the Court instructed the Jury, that Petitioner's participation in the conspiracy could be determined by his conduct (App. 61a; R. 1583), in this case his receipt of the information.

defense information. No evidence was offered to show that that information was ever given to the Soviet Union or any of its agents, and no evidence was introduced to show that the parties ever agreed or conspired to transmit information of that kind. The testimony with respect to the alleged agreement to transmit related only to information about Mensheviks, Trotskyites and German civil servants and the purpose of that alleged conspiracy could not have been changed by the act of one conspirator in securing military information and attempting to put it into the conduit. *United States* v. *Crimmins*, 123 F. 2d 271 at 273 (2d Cir. 1941).

Although the indictment charged two separate offenses, namely the conspiracy to secure defense information and a separate conspiracy to transmit such information to a foreign country, the same overt acts were alleged to support both counts; (R. 1742-1746) the prosecution did not, in the presentation of its case distinguish between the two Counts and the Trial Court did not instruct the Jury with respect to the facts they were required to find to establish the charge in Count 1 as distinguished from the charge in Count 2. Although there were occasional references to the separate offenses in his charge to the Jury the Trial Judge spoke repeatedly of the two offenses as a single conspiracy. The following is illustrative:

> "You must first determine from all the evidence in the case, relating to the period of time defined in the indictment, whether or not a conspiracy existed. If you decide that a conspiracy did exist, you must next determine whether or not the defendant was a member of the conspiracy." (R. 1584)
>
> "I charge you that whether the Union of Soviet Socialist Republics was an ally or friendly nation during the period of the alleged conspiracy is immaterial. . . ." (R. 1586-7).

"The evil which the statute, so far as this case is concerned, punishes is the obtaining, receiving, and transmitting of this guarded information. . . ." (R. 1587).

"Such proof is not enough, by and of itself, to justify your concluding there was an unlawful conspiracy, but you may consider this along with other evidence in the case in determining whether or not the subject or the object of the alleged conspiracy was to gather and transmit to the USSR information and documents concerning the national defense of the United States. . . ." (R. 1609).

The repeated submission of the case to the jury as a single conspiracy aggravated the error of submitting the First Count barred by the Statute of Limitations. See *Yates* v. *United States*, 354 U. S. 298, 311-12 (1957).

For the reasons outlined, it is submitted that the questions presented are substantial, that this petition for a writ of certiorari should be granted, and that a plenary consideration of the issues is warranted.

May 8, 1962.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 957

ROBERT SOBLEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EPHRAIM LONDON,
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APPENDIX A.

Decision and Opinion of the District Court Denying Motion for a New Trial.

HERLANDS, D. J.: The defendant moves under Federal Rules of Criminal Procedure, Rule 33, for a new trial in a proceeding in which the defendant was convicted and sentenced to life imprisonment for violations of Title 18 U. S. C. section 793(a)(c)(d)(e) and section 794(a)(c).

On August 7, 1961, the day of sentence, the defendant requested the Court to defer sentence pending the making of a motion for a new trial (Trial 1671-1688). The Court declined to adjourn sentence, stating that the defendant's attorneys should make the motion for a new trial, if so advised, in regular course (Trial 1656-1688). The motion papers herein were filed on October 5th, 1961, and made returnable on October 9th, 1961.

This Court has proceeded to determine the merits of the motion on all of the grounds permitted by Rule 33: "newly discovered evidence" and "the interest of justice." In so doing, the Court has disregarded the five day time bar prescribed by Rule 33 with respect to grounds for the motion other than newly discovered evidence. In so disregarding said time bar, this Court has not adjudicated the question whether the defendant's motion is subject to said bar, believing that the particular circumstances and the nature of this case make it advisable to determine the validity of the motion on any and all possibly applicable grounds.

The Court has proceeded to conduct full hearings on the motion for a new trial. The record of those hearings runs to 556 pages and includes numerous exhibits.

Upon the trial, two of the prosecution's key witnesses were Jack Soble, a brother of the defendant, and Mrs. Johanna Koenen Beker.

* Page references to the official transcript of the main trial record will be indicated as "Trial." Page references to the official transcript of the record of proceedings on the motion for a new trial will be indicated as "Motion."

With respect to Jack Soble, the defendant now urges as a ground for a new trial that, at the time of the trial, Jack Soble was incompetent as a witness by reason of his mental condition; that the Government failed to disclose to the defense and to the Court medical reports and data that allegedly would have demonstrated that Jack Soble was psychotic (Motion 247, 248, 275-276, 280-281, 329); and that, regardless of the diligence or lack of diligence of defense attorneys in discovering such evidence, the prosecution was required to make a full disclosure of Jack Soble's mental condition. (Motion-251-252, 270, 275-276, 280-281, 329).

With respect to Mrs. Beker, the defendant now urges as a ground for a new trial that her trial testimony centered critically around one Hans Emil Hirschfeld; that, according to her trial testimony, Hirschfeld, a wartime employee in the New York office of OSS during 1943 to 1945, had furnished her with national defense information which was in turn delivered to the defendant; that she met Hirschfeld a number of times, having originally been placed in contact with him by the defendant; and that the defendant gave her money with which to pay Hirschfeld for his services.

The defendant's present contention is that he has newly discovered evidence which, he claims, had been suppressed at the trial by the Government; that the essence of said newly discovered evidence is that Hirschfeld, in 1957 and 1960, had been confronted by Mrs. Beker and that he flatly denied ever having seen, met, spoken to or worked with Mrs. Beker; that Hirschfeld, in a number of interviews with Government representatives, insisted on his complete innocence of the inculpatory acts attributed to him by Mrs. Beker; and that Hirschfeld testified in February, 1960 before the Grand Jury for the Southern District of New York, repeating before said body the denials already referred to.

The defendant also urges as a ground for a new trial that he has discovered that various former OSS employees are prepared to testify that Hirschfeld had no access to secret information, particularly secret information about

national defense weapons; and that, as a German Social Democrat, he expressed and adhered to anti-Communist political tenets.

The defendant has also applied for leave to take Hirschfeld's testimony by deposition under Rule 15, F. R. Crim. Proc., which proposed testimony would be a comprehensive denial of Mrs. Beker's testimony.

The hearings upon this motion and the entire record made in connection therewith amplify the grounds of the defendant's motion, summarized above.

The Court's numbered and unnumbered findings of fact and conclusions of law are set forth in this decision and opinion.

HANS EMIL HIRSCHFELD.

Assistant United States Attorneys Hyde and Casey, who tried this case, accurately described (1) the procedure followed in preparing and furnishing the defense with the exhibits consisting of Mrs. Beker's F. B. I. statements; (2) the Government's compliance with the Court's rulings as to the contents of those exhibits; (3) the significance of the Government's red crayon markings on the exhibits and the condition of the exhibits when turned over to the defense; (4) the return of the exhibits by the defense and the condition of the exhibits when so returned; (5) the continuity of condition and possession of the returned exhibits from the moment of return to the time when they were produced upon the hearing of the present motion.

With respect to the Hirschfeld phase of the motion, the Court finds the following facts to have been established by the overwhelming weight of the credible evidence:

1. The complete F. B. I. reports of Mrs. Beker's interviews and statements were furnished to and read by the Court.

2. At that time each report that contained material which the Government conceded fell within the operation

of §3500 (Title 18 U. S. C.) was marked with red crayon by the Government so as to indicate the portions admittedly required to be turned over to the defense. (Trial 498, 500, 505, 516, 517, 520, 521, 524, 529; Motion 131-132, 197-199, 375). This is illustrated by Exhibits 169 and 188 (for id.).

3. Where the report in its entirety was conceded by the Government to fall within the operation of §3500, the entire report was turned over without red crayon markings. This is illustrated by Exhibit 177 (for id.).

4. There were no ink-markings around any sentences or paragraphs or in the margins of any of the exhibits for identification when such exhibits were read by the Court and when such exhibits were furnished by the prosecution to the defendant. However, when Exhibits 149, 151, 157, 159, 177 and 191 were returned by the defense to the attorneys for the prosecution, there was such ink-markings, sometimes in blue ink, sometimes in green ink, and sometimes in ink of both colors (Motion, 378).

A comparison of the portions of the exhibits so ink-marked with the use of such ink-marked portions by defendant's trial attorney on his cross-examination of Mrs. Beker, discloses that, in each instance where Mr. Brill cross-examined Mrs. Beker about a particular page of a particular exhibit, the portion of the exhibit used for such cross-examination was ink-marked as indicated above (Motion, 378). This is demonstrated by the following tabular comparison:

Trial Record (Page)	Exhibit (id) (Number)	Specific Portion of Exhibit (id) Used in Cross-Examining Mrs. Beker
1318-1322	149	page 10, 2nd and 3rd paragraphs
1332-1335	149	page 11, last paragraph
1317-1318	151	first page, 2nd paragraph
1279-1280	157	page 14, last paragraph
1308-1313	159	page 17 and page 5
1284	177	page 9 (same facts as in first two sentences of 2nd paragraph, page 11)
1326-1332	191	page 1, 2nd paragraph

The characteristics of the ink-markings on page 11 of Exhibit 177—a small hook at the top of the vertical line—appear on the marking on page 5 of Exhibit 159.

The Court finds that the ink-markings on page 11 of Exhibit 177 were placed thereon by the defense, evidencing the fact that page 11—which the defense now claims was not furnished to it—was not only in possession of the defense but was scrutinized by the defense.

The Court finds that the ink-markings on the exhibits tabulated above were placed on said exhibits by the defense.

5. The original exhibits, not photostats, were turned over to the defense, in the case of Mrs. Baker's F. B. I. statements or portions thereof. (Motion, 377.)

6. The Court made longhand notes of each ruling, recording the lines and paragraphs of each page of each exhibit to be turned over to the defense. (Motion 194-196.) Mr. Friedman made detailed shorthand notes of each of the Court's rulings.

The care to be taken, and, in fact taken, with respect to the procedure in the marking and preparing of exhibits supplied to the defense under Title 18, U. S. C. 3500 is illustrated by the Court's explicit instructions to the attorneys, as follows:

> "The Court: * * * But I do not want an argument raised later on, as in a recent case, that certain documents were discovered after the trial, or that the defense were not told about it. I am referring to the recent Consolidated Laundries antitrust case" (Trial 494-495).
>
> "The Court: * * * Let us mark the papers, whatever they are, so that there won't be any question later on about papers not being produced, and I will read them all, every word" (Trial 496).
>
> "The Court: * * * I want it specifically checked so that the record will show what the situation is.
>
> "You see, *all these things may be clerical at the* the moment, and then about three months from now

what appears to be clerical may become a cause celebre, so we may as well find out right now what the situation is." (Trial 538).

Similar instructions by the Court and the close attention paid by defense counsel to the exhibit-turnover procedure are illustrated by the following colloquy (Trial 1074-1075):

> "Mr. Friedman: A photostat of a copy of a statement, is that correct?
>
> "Mr. Casey: It is a photostat.
>
> "The Court: Suppose you give Mr. Brill the original of Exhibit 128 for identification.
>
> "Mr. Brill: I have read it already, Judge.
>
> "The Court: I want you to compare it now so there won't be any question later. If you want to, you can indicate the pagination, Mr. Brill.
>
> "Mr. Friedman: Except the original statement appears to have three lines handwritten between the typing and the signature which does not appear—
>
> "The Court: You can copy it off now. . . . You can copy it.
>
> "Mr. Brill: It is the same, your Honor. These photostats are the same as the contents of Government's Exhibit 128 for identification.
>
> "The Court: That is why I wanted the comparison made, because while it is perfectly clear to everybody now that they are the same, there may be a question raised sometime in the future by some other lawyer. That happens.
>
> "Mr. Brill: It does, it does. I have seen it happen."

The same precautions were taken with respect to the return of the exhibits. For example, at the conclusion of Mrs. Beker's examination, the prosecutor requested defense counsel to return all of the Section 3500 material previously delivered to defense counsel. Mr. Friedman said that he would "have to go around and bring them"

(Trial 1338-1339). Mr. Brill said: "I will return all I have," at which point the Court said: "Well, I think what should be done is that at the conclusion of the session this afternoon all of the material that is returned should be inventoried by the Government so that they may keep track and counsel may keep track of what is being returned so that neither side will be involved in any embarrassments," to which Mr. Brill replied: "Oh, no. That's one thing we want to avoid, your Honor." The Court then stated: "That's right. That can be taken up between counsel at the conclusion of the session," to which Mr. Brill replied: "All right." (Trial 1339).

7. Mr. Friedman, who took shorthand notes of the Court's detailed rulings as to what was to be turned over to the defense (Motion 192, 193), checked each exhibit that was supplied to him in order to assure himself that the turned-over exhibit complied with the Court's ruling. (Motion 190, 193-206; Trial 888-889, 890, 891, 1062). Mr. Friedman followed the exhibit-marking proceedings closely (See, e.g., Trial 1238). Everything was placed on the record in the presence of the defendant and his attorney (Motion 130, 196).

8. Exhibits 169, 177 and 188 (for id.) are now in the same condition as they were when they were turned over to the defense during the trial and when they were returned by the defense to the prosecution during the trial, the sole exception being the pen markings on Exhibit 177 (id.) which the Court finds (See Finding "4" above) were placed thereon while that exhibit was in the possession of the defense.

9. Exhibits 169, 177 and 188 (for id.) in particular (as well as the other exhibits in general) were turned over to the defense in complete conformity with the Court's rulings. They were delivered by the Government to defense counsel following Mrs. Beker's direct testimony (Trial, 1230, 1232, 1235; Motion 373-381).

(a) As to each of the aforesaid exhibits, defense counsel received the actual exhibit bearing the clerk's stamp for use in their cross examination of Mrs. Beker.

(b) During the trial, the defense received Government exhibits 169 id., 177 id., and 188 id. in the exact form in which they were produced at the hearing of this motion. As produced at the trial by the Government and given to the defense, those exhibits included the portions thereof separately marked at the hearing of this motion as Def. Exs. A, B, and C.

(c) At the conclusion of Mrs. Beker's cross examination, the aforesaid exhibits were returned to the Government (Trial 1338, Motion 378-379), and were kept under security lock in the United States Attorney's offices until they were produced for use at the hearing of this motion (Motion 379, 429).

The defense claim—that Exhibits 169, 177 and 188 (for id.), when turned over to the defense, did not contain the portions referring to Mrs. Beker's 1957 and 1960 confrontations of Hirschfeld and Hirschfeld's denials of Mrs. Beker's story (Motion 74, 125-126, 137, 138, 139, 177, 178, 179, 180-181, 185, 201)—is unfounded and completely devoid of merit.

Mr. Friedman and Mr. Brill and the defendant himself had possession of the exhibits turned over to the defense. The defense itself admits that Mr. Brill and the defendant read some of the exhibits. Mr. Brill eliminates himself from the picture by testifying that he relied on Mr. Friedman to call his attention to anything in the exhibits that he could use on cross-examination (Motion 220, 223, 224, 246). Mr. Brill's "best recollection" is that, during the trial, he had no information from any source of Hirschfeld's denials of Mrs. Beker's story and of Hirschfeld's denials of having met her before the 1957 and 1960 confrontations (Motion 221-222).

In the exercise of his constitutional prerogative, the defendant did not take the stand at the hearing on this

motion. No adverse inference may be drawn against him for having duly exercised his constitutional privilege.

With Mr. Brill rendered innocuous on this exhibit issue, Mr. Friedman becomes the sole protagonist.

Mr. Friedman did not produce his trial notes relating to the exhibits in question; nor did he produce any contemporaneous memoranda indicating just what exhibits or portions thereof be read. His *ipse dixit* is all that is offered.

The critical query—what was contained in the exhibits that Mr. Friedman admits were turned over to him—is sought to be answered by the defense solely on the basis of Mr. Friedman's playback of his uncorroborated memory.

In these circumstances, it is pertinent to ascertain whether Mr. Friedman's memory as displayed on the stand is such as to merit confidence in its precision, accuracy and completeness.

Hearing and reading Mr. Friedman's testimony lead the Court to find unqualifiedly that Mr. Friedman's testimony cannot be accepted as reliable and trustworthy on any of the critical controverted issues herein.

His memory, as demonstrated on the stand, was not good as to many details of the trial proceedings. See, for example, his testimony at pages 125 (3rd answer); 129 (4th answer); 138 (1st answer); 139 (2nd answer); 148 (2nd, 3rd and 6th answers); 151 (1st answer); page 154 (last answer); 155 (1st, 2nd and 3rd answers); 159 (3rd answer); 160 (3rd, 4th, 5th and 6th answers); 161 (last answer); 174 (2nd and 3rd answers); 175 (4th answer); 176 (3rd, 4th, 6th answers); 177 (1st, 4th answers); 180 (6th and 7th answers); 181 (entire page); 185 (6th and 7th answers); 186 (4th answer); 188 (1st answer); 189 (2nd answer); 190 (1st answer); 193 (2nd answer); 205 (5th and 6th answers); 207 (6th answer); 208 (1st answer); and 209 (4th answer).

To the foregoing must be added his demeanor and manner of testifying; his interest as the past and present lawyer for the defendant (Motion 211-212); his possible motive for exonerating himself from criticism for the manner in which he handled the trial that resulted in a convic-

tion; and his unfounded excuse for not having interviewed Mrs. Beker before trial. These circumstances constitute in the aggregate the basis for this Court's disbelief of Mr. Friedman's testimony.

On the other hand, this Court is firmly convinced that Assistant United States Attorneys Hyde and Case have testified truthfully and accurately.

11. Exhibit 169 (*id.*) disclosed to the defense during the trial the following facts:

(a) Mrs. Beker was interviewed by the FBI on October 9, 1957.

(b) The prosecution had no objection to turning over to the defense the excerpts contained in this exhibit that were marked with red crayon.

(c) Facts appearing in the following paragraph in the exhibit:

> "Regarding subject's confrontation of Hans E. Hirschfeld, she advised that this took place in Berlin, Germany, on September 27, 1957. She immediately recognized Hirschfeld, however, he denied knowing her. The subject said that as far as she could determine, Hirschfeld displayed no sign to her that indicated he actually recognized her."

12. Exhibit 177 (*id.*) disclosed to the defense during the trial the following facts, among others:

(a) The exhibit consists of the complete signed statement (dated February 25, 1958) of Mrs. Beker to the F.B.I.

(b) Facts appearing in the following paragraph on page 11 of the exhibit:

> "While I was in Germany recently I personally confronted Hans E. Hirschfeld in West Berlin, where he is presently an official of the West Berlin Government. This confrontation took place on September 27, 1957. I instantly recognized Hirschfeld and I am absolutely certain he is the same person

> whom I contacted in New York City at the direction of Dr. Robert Soble."

12. Exhibit 188 (id.) disclosed to the defense during the trial the following facts:

(a) Mrs. Bekey was interviewed on January 29, 1960 by the F.B.I. under the circumstances set forth in the report.

(b) The prosecution had no objection to turning over to the defense the material in this exhibit that was marked with red crayon.

(c) Facts appearing in the following paragraphs of the exhibit:

> "Johanna Bekey was escorted into the interview room for a confrontation with Hirschfeld. Hirschfeld immediately said that he recalled having met Bekey at the time that she confronted him in his Berlin office in 1937. He said that at that time Bekey had stated that he had called him at his Bronx, New York, apartment and had talked to his wife. Hirschfeld said that he had talked to his wife and that she had denied this. He said that Bekey was a 'liar'.
>
> "Hirschfeld said that prior to the 1937 confrontation, he had never met Bekey at any time. He said he was positive that he had never encountered her during his work with OSS. He denied that he had ever given Bekey information of any kind. He said he was unable to understand why Bekey had made these charges against him. He stated that the only reason that he could find for this was the fact that his name, along with the names of certain other German émigrés, had appeared in an article in the 'Neue Welt,' a publication edited by Ruth Fischer in New York City during World War II. This article had described Hirschfeld as a 'Stalin agent.'

"Beker told Hirschfeld that sometimes there were things that people did not like to remember, especially after 20 years, but sometimes it was best to remember them and to 'get rid of them.'

"Hirschfeld recalled that he had been acquainted with Beker's father, Wilhelm Koenen, who had been a Communist leader in the German Parliament for many years. Because of this familiarity with the Koenen name, he said he was certain that had he ever actually met Beker, he would have remembered her.

"Beker said that she was certain that she had met Hirschfeld in New York City as previously described, unless he had a twin brother. She told Hirschfeld that the person she met at the corner of West 23rd Street and 7th Avenue had the same face and the same name as Hirschfeld.

"Hirschfeld, at this point, stated he had a brother who lived in the Bronx.

"Beker said she had a definite recollection of having called Hirschfeld's apartment in New York on at least one or two occasions. She continued that it had been necessary for her to 'resurrect' her memory and stated that she thought that Hirschfeld should do likewise. She told him that she knew that he believed in 'our Berlin,' and said that if Hirschfeld wanted to help the cause of free Berlin, this was the time to do it.

"Hirschfeld replied that his loyalty and devotion to the city of Berlin was a matter of public record.

"Beker told Hirschfeld that he must recall the meetings which he had had with her in New York City. She said he was certain that he could remember them if given 'little helps and reminders' as she had been.

"Hirschfeld then said that he did not feel that he had to 'listen to this.' He pointed out that he

would be glad to listen to Mrs. Beker if she had something new to add, otherwise he did not want to hear any more. He claimed that he had a good memory and that he would certainly be able to recall if he had given away any OSS 'secrets'. He said he thought he had clarified this matter before, pointing out that the same allegations had been made against him during the 1957 confrontation.

"Beker told Hirschfeld that when he looked at her now and when he looked as her at the Berlin meeting, she had a feeling that he recognized her. She remarked that he had very expressive eyes. She declared that what they had done in New York City was almost understandable in view of the wartime situation in which they found themselves as German refugees in New York City.

"Hirschfeld denied that there were any facts or other matters which would help him remember any meetings with Beker, and he reiterated that he had never met her under any circumstances prior to 1957. He said he was not a child and he was positive that if these meetings had occurred, he would never have forgotten them.

"Beker stated that she could only appeal to Hirschfeld to reveal his activities, pointing out to him that while in New York City they were both 'trapped' and were in 'the same boat.' She said that now was the time and place to be truthful about this, since now 'we are all fighting for the same cause.'

"Hirschfeld said that he had been fighting for causes all his life. He told Beker that she was 'pretending,' and that he did not want to be part of her cause. Hirschfeld said that he had agreed to see Beker, now this was done, and he said he must ask that she leave.

"At that point Beker was escorted from the interview room."

14. Exhibits 169 (id.), 177 (id.) and 188 (id.) taken together plainly disclosed to the defense during the trial and one week before the case went to the jury (Motion 374-381) the following facts:—

(a) That Mrs. Beker and Hirschfeld had a confrontation in his West Berlin office on September 27, 1957;

(b) That at the time of the said 1957 confrontation Hirschfeld was an official of the West Berlin Government;

(c) That, while Mrs. Becker said she immediately and positively identified Hirschfeld at the said 1957 confrontation, Hirschfeld flatly denied knowing her;

(d) That there was a second confrontation between Mrs. Beker and Hirschfeld, this one occurring in New York on January 29, 1960;

(e) That, at said 1960 confrontation, Hirschfeld called Mrs. Beker "a liar"; that Hirschfeld insisted that he had never met her at any time while he worked at OSS, that he never gave her any information, and that all of her accusations of him were false; and that he could not understand why she would make any such statements about him.

15. There is no evidence that the Government suppressed the aforesaid evidence either wilfully, negligently, inadvertently or otherwise.

In order to make the charge of suppression more palatable, the defense disavows any imputation of sinister conduct to the prosecutor and, instead, attributes the suppression to "mistake," "inadvertence" or "confusion." (Motion 133, 179, 202).

However, the very position taken by the defense as to what happened necessarily amounts to an accusation that the two Assistant United States Attorneys who tried this case committed the following acts:

(1) They flatly violated the court's specific rulings by excising selected parts relating to Hirschfeld and then,

having excised such Mrs. Beker-Hirschfeld references, turned over the emasculated exhibits to the defense.

(2) The Assistant United States Attorneys falsely stated on the trial record that they had furnished the exhibits as ordered by the court.

(3) When the "incomplete" exhibits had been read by defense counsel and returned by them to the prosecutors, the latter substituted complete exhibits for those returned, and placed the complete exhibits in the Government's security file.

(4) The Assistants then produced before this Court on the hearing of this motion for a new trial, the complete exhibits.

Despite the disavowal by the defense of the charge of intentional wrongdoing, the pervasive innuendo is that the Assistants perpetrated a hoax on the defense and the Court by a species of legerdemain. What the defense charges is not true. The prosecution did in fact furnish the defense with exhibits in full and complete compliance with the court's order. These exhibits contained all of the Mrs. Beker-Hirschfeld references that now appear in those exhibits. It is the defense, not the prosecution, who is attempting to impose upon the court.

16. During the trial, defendant was informed by the Government that Hirschfeld was believed to be in West Berlin then, and that he had just been interviewed there by a newspaperman (Trial 1426). Government counsel did not know where Hirschfeld was actually living at the time of trial (Motion 429, 430).

At first, the defense claimed on this motion that the prosecution made "knowing misstatements of fact" as to Hirschfeld's whereabouts (Motion 202). Subsequently, the defense modified this claim to an assertion that the prosecutor "did know or should have known" where Hirschfeld was living when the Government made the statement to the Court (Motion 235).

Regardless of the verbalization of the defense claim, the Government did not—wilfully, negligently or inadvertently—make any false or misleading statement to the prejudice of the defendant.

17. Defendant has failed to prove facts showing diligence on his part in procuring the allegedly new evidence concerning Hirschfeld. Defendant had every opportunity at the trial to procure Hirschfeld's testimony in person or to ask for leave to take Hirschfeld's deposition abroad.

18. The defendant was informed on January 11, 1961 that Mrs. Beker was to be a Government witness. She was called to the stand on July 6th (Motion 232, 238). The defense never attempted to interview her and find out what her testimony would be (Motion 111, 114, 232-33).

Mrs. Beker's name and address were set forth on the list of prospective prosecution witnesses furnished to the defense on January 11, 1961. The list was supplied under authority of Title 18 U. S. C. Section 3432 (based on Title 18 U. S. C. (1940 ed.) Section 562; derived from Act April 30, 1790, Ch. 9 Section 29; 1 Stat. 118).

Mr. Friedman was aware of this statute. In his moving affidavit, sworn to December 22, 1960, Mr. Friedman, applying under Title 18 U. S. C. Section 3432, said (in paragraph "7"):

> "To facilitate proper preparation for trial, it is necessary that the list of Government witnesses *and their places of abode be furnished promptly.*" (Emphasis Supplied.)

The purpose of the statute "is to afford the accused an opportunity to endeavor to ascertain what testimony he will have to meet and to prepare to meet it." *See Cluff* v. *U. S.* (8th Cir. 1927) 18 F. 2d 906, 907; *Logan* v. *U. S.* (1892) 144 U. S. 263, 304; *Holmes* v. *U. S.* (D. C. C. A. 1926) 11 F. 2d 569, 572; *U. S.* v. *The Insurgents of Pennsylvania* (Cir. Ct., Dist. of Penn. 1795) 2 U. S. (Dallas) 334, 341; *U. S.* v. *Stewart* (Cir. Ct., Dist. of Penn. 1795) 2 U. S. (Dallas) 343; Cf. *U. S.* v. *Aviles* (S. D. Cal. 1915) 222 F. 474, 477.

When, in June 1961, the prosecution served Mr. Friedman with a supplementary list of prospective prosecution witnesses, Mr. Friedman expressly told the Court that he wanted adequate time to interview these witnesses. This appears in the minutes of the pre-trial proceedings on June 16, 1961, as follows [Emphasis Supplied]:

> "[Mr. Friedman]: Here we have a fresh batch of witnesses, some of whom live in the vicinity, five of whom live in New York City in the metropolitan area. *I want to make appointments with them; go around and see them and hear what they have to say, what information they may have which will bear on the evidence.* I don't know what their testimony will be. I don't see why at the eleventh hour in a case which has been pending six months, *where the Government has been able to give me other witnesses' names six months ago* that I should now be faced with this. This isn't a game. The purpose of the trial is to reach a just determination and I think in all fairness I should be permitted a continuance. While the statute technically says not less than three days, that doesn't deprive the Court of its discretion to allow the defendant a reasonable time to prepare his defense. This is potentially a capital case." (Pre-trial record, June 16, 1961, pages 185-186).
>
> . . . . . .
>
> "The Court: I want to comply not only with the letter of the statute that requires furnishing the defendant with a list of witnesses, but I want to comply with the spirit of the statute as well, and there is no doubt, nor is it suggested by Mr. Friedman, that there hasn't been technical compliance with the statute.
>
> "Mr. Friedman says that he would like to have a *reasonable opportunity to interview or attempt to interview those witnesses who are on the supplemental list*, and it occurs to me that when, as and if the Government intends to call any of the witnesses on the supplementary list, and I recognize that

the Government may change its mind as to calling any of these witnesses, but assuming that the time comes when the Government does intend to call one or more of the witnesses on the supplementary list, that perhaps a day or two before these witnesses are called and while they are in the Southern District of New York arrangements be made perhaps through consultation with the Court and counsel, because I presume we'll be on trial, if the witnesses consent to be interviewed, *that Mr. Friedman have the opportunity to interview these witnesses* who will be in or near the Courthouse and he would be given the opportunity to interview them, as I say, if they consent to be interviewed, at, say, the Bar Association or the New York County Lawyer's Association, or some place where there won't be any suspicion about the room being bugged or wired.

"So that before any of these witnesses take the stand, meaning the witnesses on the supplementary list, two things will be accomplished for the protection of the defendant:

"First, that Mr. Friedman will be notified that they are being called and that he may, if he doesn't know them or his client doesn't know them, be introduced to them so that he meets them face to face and talks to them alone *to find out whether they consent to be interviewed, and, if so, to interview them, and I think perhaps in that way the rights of the defendant may be vigilantly protected by the Court by some such arrangement.*

"I'm going even beyond the statute. Let's assume in the case of this Mrs. Maria Meyer-Sevenich, who apparently lives in Germany, the woman is brought to the United States and the Government intends to use her as a witness. I would be willing to suggest, because I don't know the Government's position, that in case she is called that Mr. Friedman be notified a day or two in advance, perhaps two

days in advance, and be told that 'This woman is here; we are going to call her as a witness; we'll be glad to introduce you to her; you can talk to her any place you want outside the building,' and in that way accomplish what is the objective of the statutory provision.

"What I am suggesting is an extemporaneous proposition designed, on the one hand, to eliminate a protracted adjournment and, on the other hand, to achieve a measure of protection of the defendant's position as advocated by Mr. Friedman.

"Mr. Friedman: May I say one other thing on that subject, your Honor? Interviewing a witness in the course of a trial, after a number of other witnesses have testified, is never as satisfactory as *an opportunity to interview a witness before a trial commences*, because as your Honor well knows, in a case of this kind especially, when conspiracy is alleged, the testimony of one witness may have some bearing upon the testimony of another, and if I find out on the 10th day of the trial that witness so and so has such and such information which might have been very helpful had I known it a week before, the entire effect of *the opportunity to interview witnesses* is in a sense curtailed. I think your Honor understands what I mean.

"The Court: Yes, I understand your argument.

"Mr. Friedman: I would like it as far as possible before the commencement of the trial, so that when one witness testifies and what I have learned from one witness has a bearing upon another witness' testimony, I will have a chance."

(Pre-trial record, June 16, 1961, pages 191-195).

"The Court: * * * The issue before me now, stated in plain English, is whether I should grant Mr. Friedman's request for an adjournment to some time in July or August.

"Mr. Friedman has stated three reasons for that request, as I understand it: Because he has an

engagement in the Court of Appeals on Monday; secondly, that he needs more time to prepare, and, third, *that while he has received timely the supplementary list of Government witnesses, he has not had an opportunity to contact or interview these witnesses.*

"* * * As to the third reason that you need time to interview the nine witnesses whose names and addresses appear on the supplementary list, the Government witnesses, as to that I'm going to put a question to Mr. Casey:

"Mr. Casey, are you adverse to the suggestion I made about letting Mr. Friedman know a couple of days in advance when you are calling these witnesses?

"Mr. Casey: We have no objection at all to it, your Honor, if the witnesses, of course, are willing to talk to him.

"The Court: Naturally, if they are not going to be called the whole thing becomes academic. If any one of the witnesses on this list are going to be used as Government witnesses—I'll participate in the conference so that we can make a record—are you willing to let Mr. Friedman know, say, two days in advance, perhaps three days in advance?

"Mr. Casey: As best as I can estimate when it comes, that is two or three days. Yes, your Honor, we'd be willing to.

"The Court: Let's say three days in advance, before you call any one of these witnesses, there will be a conference, and you'll let me know so I can meet with counsel, and Mr. Friedman will be advised that you are planning to call one or more of these witnesses, and you will afford him the opportunity to meet these witnesses, to talk with them at the Bar Association or at the New York County Lawyers' Association or on Bedloes Island or some other place where he doesn't have to worry about the room being

bugged or wired, so that he has free access to talk to these people, if they want to talk to him.

"Mr. Friedman: How can that be, if the case is on trial?

"The Court: I will adjourn the trial to enable you to interview and talk to any of these witnesses.

"Mr. Friedman: Getting the list of names before the trial doesn't mean a thing.

"The Court: The law only requires——

"Mr. Friedman: I understand. You spoke about the spirit of the law. *If the spirit of the law is fulfilled by an opportunity to interview witnesses* during the trial, I guess——

"The Court: I am only a judge. I am not Congress. Congress says you are entitled to three days' notice and you got three days' notice. I am willing to go beyond that.

"Mr. Friedman: Your Honor doesn't give me more notice by *permitting me to interview witnesses* during the trial.

"The Court: Isn't that better than not interviewing them at all?

"Mr. Friedman: Not much. I would like to *know what they are going to testify before the first witness has testified*, otherwise that witness may go to a foreign country and that is the end of the witness, and I can't ask him about any of the dealings with these dealings, because I haven't ascertained that. * * *

"Mr. Friedman: I will accept anything that is helpful to my client. I'm merely stating that it is not as good as any opportunity to be able *to interview a witness before trial.*

"The Court: The suggestion is reinstated.

"Mr. Casey, do we have your consent to reinstate it?

"Mr. Casey: Yes."

(Pre-trial record, June 16, 1961, pages 200-210).

Mr. Friedman fully realized the importance of interviewing the prospective Government witnesses as soon as possible, and he earnestly sought and obtained the opportunity to do so.

However, on the hearing of the motion for a new trial, Mr. Friedman and Mr. Brill—in an endeavor to explain their failure to interview or attempt to interview Mrs. Beker (Motion 111-112)—engaged in a volte face and proffered the excuse that it would have been "improper" for them to interview her or any prospective Government witnesses. Mr. London said (Motion, 112) that Mr. Friedman "could not, with propriety, have attempted to interrogate Mrs. Beker." Mr. Brill likewise declared (Motion 232-233) that he did not attempt to interview Mrs. Beker because "it would be improper."

Actually, the Canons of Professional Ethics, Canon 39, relevantly provides:

> "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party."

The same provision almost verbatim is contained in Canon 10 of the Code of Trial Conduct of the American College of Trial Lawyers. See 12 Syracuse L. Rev. 467-468 (1961); 43 A. B. A. J. 223, 225 (1957).

19. Hirschfeld's name was included in the questions on the voir dire submitted by the Government and put to the jury panel by the Court (Court's Exh. III; Trial [June 19, 1961] 46; Motion 159-160, 236-237).

The memorandum of voir dire questions proposed by the Government had been served on defense counsel before the trial began (Trial [June 19, 1961] 12).

At no time during the trial did defense counsel attempt in any way to ascertain Hirschfeld's further identity or whereabouts, according to both Mr. Friedman and Mr. Brill (Motion 208-240).

20. Section 3500 statements furnished to defendant after Jack Soble testified on direct examination were replete with references to Hirschfeld's name and put defendant on notice from the beginning of the trial as to Hirschfeld's importance in the case (Motion 207-226; Trial Exs. 37 id., 44 id., 46 id., 53 id., 88 id.; also Soble's Grand Jury testimony, Trial Ex. 17 id.; Trial pp. 2097-98). Other exhibits marked in connection with Jack Soble's testimony, as well as the testimony itself, pointed up to the role Johanna Beker played in transmitting information from O. S. S. to the defendant (Trial 402-422-23; Tr. Exs. 82 id., 104 id., 106 id., 108 id.).

21. Johanna Beker's testimony further emphasized Hirschfeld's role in the case and brought it before the jury (Trial 1196-1210, 1240-48).

22. Mrs. Beker also testified on direct that after her espionage meetings had ceased in 1945, "I saw Dr. Hirschfeld subsequently in Berlin and in New York" (Trial 1210). Although Mrs. Beker was extensively cross-examined concerning her activities with Hirschfeld (Trial 1283-92, 1298-99, 1303-08, 1322, 1325), defense counsel, as a matter of professional judgment, deliberately refrained from cross-examining her about her two post-1945 meetings with Hirschfeld (Motion 239).

Mr. Brill testified that, *during the trial*, there was direct testimony by Mrs. Beker that she had seen Hirschfeld on two occasions—"I think it was in Berlin in 1957 and once again in January, I think, of 1960" (Motion, 220).

The dates "1957" and "1960" were *not* mentioned by Mrs. Beker in her trial testimony or by any other witness in the entire record. Mrs. Beker testified (Trial, 1210): "I saw Mr. Hirschfeld subsequently in Berlin and in New York." The only places where the dates "1957" and "1960" are mentioned are in the portions of the exhibits that defense counsel now claim they never read or saw. Mr. Brill's testimony would indicate that he read the por-

tions of the exhibits that the defense claims were never furnished to it.

23. Included in Beker's cross-examination was extensive interrogation based on the Section 3500 statements furnished to the defense (Trial Tr. 1280, 1294, 1308-13, 1317-22, 1326-34).

24. As the Government was about to close its case on July 11, 1961, the Court called counsel up to the bench and raised the question of whether the defense planned to argue to the jury that an inference that the testimony of Hirschfeld and Baerensprung would be adverse to the Government would be drawn from the Government's failure to produce them at trial. (Motion 241-242). In that context, the Court asked the Government where Hirschfeld and Baerensprung were (Trial 1425; Motion 242). The Government said that Baerensprung was dead and then pointed out that it believed that Hirschfeld was in West Berlin and that he had been interviewed there by a newspaper man that week (Trial 1426). Defense counsel did not attempt to elicit further information from the Government (Motion 218).

At no time during the foregoing colloquy in the presence of Mr. Friedman and Mr. Brill was a single question asked by defense counsel, nor was any request made by defense counsel with respect to Hirschfeld (Motion 244-245). The purpose of the statement made by Mr. Casey was to explain why one Boris Morros was not being called as a Government witness (Trial 1425) viz., that Morros was in the hospital; that Baerensprung was dead; and that Hirschfeld was outside the jurisdiction of the United States.

25. During the course of the trial, defense counsel made no efforts to find out where Hirschfeld was living (Hearing Tr. 208, 240), and never asked for additional time to obtain such information, if it was needed.

26. In argument on the defendant's motion to dismiss at the end of the Government's case, defense counsel stated

that the prosecution had not produced Hirschfeld or Baerensprung to corroborate Mrs. Beker (Trial, 1456-1457). When the Court referred to the Government's statement at the bench that Hirschfeld was outside the country, defense counsel replied "Well, that is only hearsay." The Court then stated: "It is not being argued," and defense counsel replied "No." (Trial 1457).

27. In summation to the jury, the defense adopted the position that the Government had failed to prove that the national defense was involved in the material supplied by Hirschfeld and Baerensprung to the defendant via Mrs. Beker (Trial 1510-24). Although challenging Mrs. Beker's credibility, the defense never argued that the Government had failed to prove that Hirschfeld had given any information to Mrs. Beker.

On cross-examination of Mrs. Beker, the defense attempted to establish that the reports that Mrs. Beker received from Hans Hirschfeld related only to German political activities in the United States, as distinguished from national defense matters (Trial 1292-1293, 1294, 1295, 1298). The defense position was not to deny that the defendant had received reports from Hirschfeld through Mrs. Beker, but that the reports did not relate to national defense. (See, for example, Trial 1305-1306, 1322, 1325). Mrs. Beker had identified Hirschfeld by photograph (Trial 1199; Trial Exh. 147); and she described how she had worked together with Hirschfeld and the defendant (Trial 1196-1203; 1206-1210; 1240-1248).

The defense did not request the Court to examine Mrs. Beker's Grand Jury testimony as a preliminary to obtaining portions disclosing prior inconsistencies.

28. After the jury returned its verdict, defendant apparently had no difficulty in locating Hirschfeld in West Berlin.

No credible evidence was adduced by the defense at the hearing proving that Hirschfeld could not have been located and spoken to by the defendant before the end of the trial with the exercise of reasonable diligence.

29. The evidence which defendant offered at the hearing of this motion pertaining to Hans Hirschfeld is not in fact newly discovered, i. e. not discovered since the trial.

30. The Court advised counsel that a reasonable adjournment would be granted in order to enable the defense to arrange for Hirschfeld's appearance as a witness upon the hearing of this motion (Motion, 165-173).

The Department of Justice expressed formally its willingness to give Hirschfeld immunity in order to have him appear as a witness upon the hearing of this motion (Motion, 345-346).

Hirschfeld, however, would not appear here unless he were given advance assurance of immunity against possible prosecution for alleged perjury arising out of his prospective testimony upon the hearing of this Motion. (Motion, 346-347, 350, 351-353, 357-358; Court's Exhibit IV).

In view of the foregoing and for reasons expressed in an opinion dictated into the record (Motion, 546 et seq.), the Court denied the defendant's application under Rule 15, F. R. Crim. Pro., to take Hirschfeld's deposition for use on this motion. Said opinion is now set forth as an appendix to this decision.

31. ~~Motion~~ Exhibit H (id) [Motion, 283, 311] consists of 120 pages of Hirschfeld's testimony before the Grand Jury, S. D. N. Y., on February 5th and 8th, 1960. At page 04534, he testified, "I don't know why she [Mrs. Beker] pretends to have met me, why she says all the lies about me. I can only say I don't know. I have no explanation whatsoever for that."

Hirschfeld told the Grand Jury that he never met or spoke to Mrs. Beker at any time prior to the 1957 confrontation in Berlin; that he had called her "a liar" in 1957; that he never gathered and transmitted any information in behalf of the Russians; that he never obtained information relating to the production or manufacture or code name of any secret weapon being undertaken by the United

States Government; and that he never knew, met or made contact with the defendant. (pages 04515-04521, 04524).

Hirschfeld said that, since October 1957, he discussed Mrs. Beker's statements about him "with the people who were working with me in the office, namely, Mrs. Stone, S-t-o-n-e, for instance. I discussed, by the way, with Mr. Stone the whole affair long before I came to the States, and with others, too." (pages 04533-04534).

Motion Exhibit I (id) [Motion, 285] is the same as Exhibit 187 (id) marked on the trial. It is the FBI interview report dated January 29, 1960. The first page covers an interview with Hirschfeld on that date. The 2nd and 3rd pages and the first three paragraphs on the 4th page cover Mrs. Beker's confrontation of Hirschfeld on that date and the statements made at that time by Mrs. Beker and Hirschfeld. The balance of the 4th page and the 5th page cover Hirschfeld's statement after the confrontation. The portions of Exhibit 187 (id) ordered to be furnished to the defense upon the trial are contained in Exhibit 188 (id). [Motion, 312-314].

Motion Exhibit K (id) is an F. B. I. report dated April 26, 1960. It covers interviews with Hirschfeld on January 26, 27, 28 and February 1, 1960. [Motion, 311-311A].

Motion Exhibit L (id) is a 37-page document, covering interviews with Hirschfeld in West Berlin on October 29, 30, and 31, 1959 by Victor C. Woerheide, of the U. S. Department of Justice. [Motion, 319].

Motion Exhibit M (id) is a 21-page summary of interviews with Hirschfeld on October 29, 30 and 31, and November 4, 7 and 8, 1959 in West Berlin by representatives of the U. S. Department of Justice. [Motion, 319].

Motion Exhibit N (id) is substantially the same as "Exhibit I" attached to the motion papers. It is a statement by Hirschfeld "To the Government of the United States of America."

Motion Exhibit Y (id) is a 3-page report dated October 24, 1957. It covers an interview with Hirschfeld in Berlin on September 27, 1957 and Mrs. Beker's confrontation of him on that date.

Motion Exhibit Z (id) is a 3-page report by Victor C. Woerheide, U. S. Department of Justice, covering interviews with Hirschfeld on October 29, 30 and 31, 1959.

Motion Exhibit AA (id) is a 2-page supplementary report by Victor C. Woerheide covering contacts with Hirschfeld on November 4, 7, 9 and 10, 1959.

32. The evidence which would be produced through Hirschfeld is not of such nature that, on a new trial, it would probably produce an acquittal (accepting the statements set forth in Exhibits I, J, and K of Mr. Brill's moving affidavit as containing the substance of the evidence which would be produced through Hirschfeld).

(a) Defendant has not shown that Hirschfeld would come to the United States to testify were the Court to order a new trial. The statements of counsel at the hearing (including Hirschfeld's own counsel) indicate, on the contrary, that he would refuse to come unless the Government granted him immunity from arrest while here even for possible perjury (Motion 296-306, 345-55, 356-59; Court Ex. IV).

(b) If a new trial were ordered, and if Hirschfeld's testimoney were to be taken in West Berlin for use at the new trial, his testimony by deposition would be subject to the infirmities alluded to in the Court's opinion denying the motion to take Hirschfeld's deposition for use at the hearing of this motion (Motion 546-550).

(c) Taking the trial record as a whole, the Court cannot find that Hirschfeld's testimony (if it could be presented and assuming that he would deny the material parts of Mrs. Beker's testimony concerning him) would probably produce an acquittal for the defendant.

33. Mr. Brill, the defendant's trial counsel, has been practicing law for 30 years. He specializes in trial work (Motion, 228).

Mr. Friedman, the defendant's co-trial counsel and attorney of record, has been a member of the Bar for 36

years. He has participated in several hundred criminal cases, including about a hundred federal criminal cases. He has handled about fifty appeals in the Court of Appeals for this Circuit (Motion 142-443).

Upon the trial, the defendant was represented by able and experienced lawyers.

Jack Soble

With respect to the Jack Soble phase of the motion, the Court makes the following findings of fact on the basis of the overwhelming preponderance of the credible evidence:

1. The evidence pertaining to Jack Soble's medical reports which defendant offered at the hearing is not in fact newly discovered, i.e., not discovered since the trial.

2. Defendant knew, at the trial, of Jack Soble's mental condition, his suicide attempt and the fact that he had had a series of shock treatments (Motion 148-155, 228, 230-31). This was brought out on cross-examination (Trial 589-98). His mental condition was argued to the jury in defense summation (Trial 1509-1510, 1514).

The Court charged the jury specifically on the issue raised by defense counsel's claim "that Jack Soble was utterly irresponsible, perjurious, and mentally incompetent" (Trial, 1569).

3. Defendant's trial attorneys deliberately refrained from subpoenaing medical or hospital records of Jack Soble because he felt they were not necessary to defendant's case (Motion 147, 149-154, 229-31).

The defendant himself is an experienced psychiatrist (Motion, 289). Before and during the trial, the defendant recognized the availability and the forensic-medical significance of any medical reports on his brother Jack in Bellevue Hospital and the Medical Center for Federal Prisoners, Springfield, Missouri.

The defense decision made during the trial not to subpoena or request the production of medical reports and the

Zborowski record and not to put a psychiatrist on the stand was a calculated strategy, a deliberate decision in the exercise of professional judgment.

4. Defendant has failed to prove facts showing diligence on his part in procuring the allegedly new evidence concerning Jack Soble's medical reports.

5. At the trial, the Government informed the defendant that Jack Soble had been a witness in the case of *United States* v. *Zborowski* (Trial 508, 510).

Assistant U. S. Attorney Hyde said:

> "In that connection I think I should point out for the record that the defendant Jack Soble testified as a Government witness in the case of United States *v.* Zborowski which was held here in this court, I believe, in November 1958" (Trial 508). The case was identified as having been tried before Judge Cashin (Trial 508). Mr. Hyde further stated: "Your Honor, to continue with my remarks on the Zborowski testimony, I simply want to point out that the witness did testify there, and, of course, that testimony is a matter of public record, part of the files of this Court, and is easily available to defense counsel so that the Government does not feel that that is testimony which it is required to produce" (Trial 510). Mr. Hyde added: "I just wanted to make it clear that that does exist" (Trial 510). The Court said: "I am sure the defendant's counsel knows about it". (Trial 511). The defense made no comment.

Defense counsel admit that they deliberately did not read the Zborowski record (Motion, 143-144, 156-158).

Reference to the transcript of that case (which is a public record on file with the Clerk of this Court) *would have identified most of the medical reports* which defendant now describes as newly discovered. Trial counsel delib-

erately refrained from examining the record in the *Zborowski* case. (Motion 143-144, 225-226, 228-229).

6. In connection with the production of Section 3500 material, the Court cited the opinion of the Court of Appeals in *United States* v. *Zborowski*, 271 F. 2d 661 (2d Cir. 1959). The text of that opinion also put defendant on notice concerning the availability of medical reports concerning Jack Soble. See 271 F. 2d at 667:

> "The government points out that Soble was subjected to intense and detailed cross examination for nearly three days; *that defense counsel had available for this purpose the reports of several doctors at both state and federal institutions including the complete medical treatment dossier maintained at the Medical Center for Federal Prisoners;* * * *."

7. The defense never requested the government to produce Jack Soble's medical reports nor did it subpoena them (Motion, 229-30).

Mr. Friedman knew that hospital and medical records can be subpoenaed and thus produced in court (Motion, 147).

Mr. Friedman was aware that Jack Soble had been confined in the M. C. F. P. at Springfield, Missouri, and at Bellevue Hospital; that he had received shock treatments; and that certain named doctors had treated him. (Trial, 589-598, 590; Motion, 149-154).

Mr. Friedman admitted that he never attempted to obtain any medical or hospital records pertaining to Jack Soble's mental condition, despite the information on that subject brought out in the trial. (Motion, 154).

8. Defendant has not shown that the reports in question were unavailable to him at trial through the exercise of reasonable diligence.

Defendant's present attorney conceded upon the hearing of this motion that, if the defendant's trial counsel had pursued this matter diligently, they would have discovered

the evidence concerning Jack Soble's mental condition. (Motion, 249, 251, 280).

9. The Jack Soble medical reports are cumulative evidence and impeaching. Upon the trial, Jack Soble was cross-examined at length concerning his mental condition "in jail"; his suicide attempt; his series of shock treatments; his stays in Bellevue Hospital psychiatric ward and at the M. C. F. P., Springfield, Missouri; and the treatments at those hospitals. (Trial, 589-598).

10. The Jack Soble medical reports (Motion Exhibits for identification E, F, G, J, V and W), are not of such nature that on a new trial they would probably produce an acquittal.

Exhibit E (id), "Special progress report" dated October 16, 1958, by Ernest Bergel, M.D., Staff Psychiatrist at M. C. F. P., contains the following statement:

> "It is the opinion of the staff that this patient has made substantial improvement and that he is fully competent to testify as a witness."

Exhibit F (id), "report of psychiatric examination" dated April 21, 1959, by Dr. Bergel, deals with Jack Soble's condition ("typical post shock syndrome") following electric shock treatments received since March 1959.

Exhibit G (id), includes a report entitled, "First Presentation at the Medical Center" dated July 8, 1958; a report entitled, "Physical Examination and Correlated History" made on April 18, 1958; a 6-page report by Dr. Donald B. Rinsley, Staff Psychiatrist, of "Neuropsychiatric Examination."

Exhibit J (id), is a 5-page report dated February 24, 1958, by Dr. M. B. Root, U. S. P. H. Service psychiatrist, to Warden J. C. Taylor. The diagnosis was "psychoneurosis—depressive reaction with anxiety and hypochondriasis." (Motion, 310).

Exhibit V (id) is a letter dated January 11, 1960 from the Chief of the Neuropsychiatric Service, M. C. F. P., Dr. Joseph C. Sturgell, to Acting United States Attorney Morton S. Robson. Referring to Jack Soble, the final sentence of the letter reads: "His mental condition at this time is such that he should be able to function adequately as a witness."

Exhibit W (id) is a report (dated January 1960) by Dr. T. E. Clanon, Staff Psychiatrist at M. C. F. P., Springfield, Missouri. Inter alia, the report refers to Jack Soble's job performance as "increasingly superior", "helpful to other patients", "congenial with coworkers and supervisors", "he has shown significant improvement in his ability to function", "His work has been superior enough to prompt recommendation for meritorious award".

11. The testimony of Dr. Donald B. Rinsley appears in the Zborowski record. The report of his final diagnosis of Jack Soble was marked as Defendant's Exhibit X in the Zborowski trial. In the course of his medical testimony in the Zborowski trial, he said that he was of the opinion that Jack Soble "is capable of telling the truth". (Motion, 258); that "the determination of whether anything he [Jack Soble] said was true or not would have to rest upon essentially the same standards that you might use or that the jury would have to use"; that whether a particular statement of Jack Soble was or was not true "would have to be determined by the situation which was being described and the particular recall of that situation which Mr. Soble was making at the time." (Motion, 259); that people who are seriously ill can still tell the truth and are competent to testify in court (Motion, 261); that "most definitely" the jury could determine the credibility of such a witness (Motion, 261-262).

The medical report dated October 16, 1958 was read, at least in part, into the Zborowski trial record (Motion, 262-263).

FORMER OSS EMPLOYEES

With respect to the "former OSS employees" phase of the motion, the Court makes the following findings of fact on the basis of the overwhelming preponderance of the credible evidence:

1. Upon the hearing of this motion, and in compliance with the Court's direction following defendant's request, the government produced the following F. B. I. reports of interviews with former OSS personnel: Defendant's Exhibits N, O, P, Q, R, S and BB (all marked for identification).

Exhibit N (id) consists of pages 49-60 of Trial Exhibit 162 (id). The indicated pages cover F. B. I. interviews with four former OSS employees: Dorothea Cronin (on May 28, 1957); Catherine V. Glynn (on May 25, 1957); Caroline Hepner (on May 27, 1957); and Emmy C. Rado (on June 4, 1957). (Motion, 361).

Exhibit O (id) consists of pages 32-38 of F. B. I. report dated August 28, 1957. The indicated pages cover interviews with three former OSS employees: Frederick C. M. Kempner (on May 29, 1957); Hans J. Meyer (on May 24, 1957); and Alessandro Moro (on May 24, 1957) (Motion, 366).

Exhibit P (id) consists of pages 2-4 of F. B. I. report dated October 4, 1957. The indicated pages cover an interview with a former OSS employee, Felicia G. Bock (Motion, 366).

Exhibit Q (id.) consists of pages 11 and 12 of F. B. I. report dated October 30, 1957. The indicated pages cover an interview with a former OSS employee, John Botton, on September 10, 1957 (Motion, 367).

Exhibit R (id) consists of pages 28-42 of F. B. I. report dated April 9, 1958. The indicated pages cover interviews with nine former OSS employees: Mary A. Homans (on February 17, 1958); Felicia G. Bock (on February 17, 1958); Joseph Botton (on February 13, 1958); Dorothea Cronin (on February 13, 1958); Catherine V. Glynn (on February 13, 1958); Caroline Hepner (on February 11, 1958); Fred-

erick C. M. Kempner (on March 6, 1958); Hans J. Meyer (on February 14, 1958); Alessandro Moró (on February 12, 1958) (Motion, 368).

Exhibit S (id) consists of pages 12-15 of F. B. I. report dated June 17, 1958. The indicated pages cover an interview with former OSS employee, Emmy C. Rado, on March 9, 1958 (Motion, 368).

Exhibit BB (id.) is an F. B. I. report dated July 1, 1959, covering an interview with a former OSS employee, Maria Deutsch on June 19, 1959.

None of these F. B. I. interview-reports with former OSS personnel were turned over to the defense during the trial; and there never was any request by the defense for any such reports during the trial (Motion, 525-526).

2. Upon the hearing of this motion, defendant called Caroline Hepner (Motion, 458ff, 518ff) and Charlotte Stone (Motion, 477ff), two former OSS employees who had worked in the New York Biographic Records Section of OSS. Their cumulative testimony described Hirschfeld's articulated political views as a German Social Democrat, and painted the picture of Hirschfeld's official OSS duties as confined to office research and indicated the limited kind of information that came within the official activities of the Biographic Records Section in which he worked. The substance of such testimony is that neither the Biographic Records Section nor Hirschfeld had access officially to secret national defense weapons information.

The defendant also called H. Stuart Hughes, who was attached as an Army officer to OSS during the period from the beginning of 1942 to the beginning of 1946 (Motion, 50ff). During most of that period, he was outside the United States. He never visited the New York office of OSS. He never met, saw or spoke to Hirschfeld (Motion, 68-69). He had no knowledge whether or not top secret information was available in the New York office of OSS (Motion, 84). He himself "Knew virtually nothing about what the highly-secret branches (of OSS) were doing" (Motion, 54). He said that nothing relating to American weapons ever went

to OSS (Motion, 57). He described the tenets of the German Social Democrats as anti-Communistic.

Attached to the motion papers as exhibits annexed thereto are Exhibits C, E and G, consisting of two letters and an affidavit of Herbert Marcuse. Marcuse worked in the Washington office of OSS during the war. Marcuse was in Paris during the hearings on this motion, according to defense counsel (Motion, 38-40). At first, defense counsel said he could arrange for the taking of Marcuse's deposition (Motion, 39) but later defense counsel stated that he wanted to think over what he would do with Marcuse (Motion, 40-41, 163-165).

Assuming Marcuse would testify at this hearing in accordance with his prior letters and affidavit, such testimony would not materially alter any of the findings and conclusions contained in this decision.

3. The evidence of former OSS personnel which defendant offered at the hearing of this motion is not in fact newly discovered, i.e., not discovered since the trial.

The defendant's trial counsel deliberately chose, as a matter of professional judgment, not to locate and not to call any witness who had been connected with OSS; nor did he cross-examine the witness Otto Doering, called by the Government to describe the functions of OSS (Motion, 209, 233-234a).

Mr. Brill testified that it was his "professional judgment" that the defense "should not call an OSS witness or attempt to locate one" (Motion, 234-235).

4. Defendant has failed to prove facts showing diligence on his part in obtaining the testimony of the OSS witnesses who appeared at the hearing of this motion.

Each of these witnesses was available at the time of the trial. Defense counsel was able to locate them without difficulty when they attempted to do so (Motion, 79-82, 96-97, 502, 521).

5. The evidence produced by defendant at the hearing through the witnesses Hughes, Hepner and Stone is not of

such nature that on a new trial it would probably produce an acquittal.

GENERAL FINDINGS.

1. Defendant was represented at the trial by two attorneys of his own choice. Both of defendant's attorneys were trial lawyers of long experience (Motion, 142-43, 228).

2. Defendant received a fair trial in every respect.

3. The Government did not withhold, suppress or conceal any facts, testimony or documentary evidence which the defendant was entitled to receive or have disclosed to him. The Government's conduct complied with all controlling standards and criteria of fairness, propriety and ethics.

4. The defense was not misled or lulled into inaction by anything the prosecutor said or did with respect to Hans Hirschfeld or Jack Soble.

5. The defense had the fair and reasonable opportunity in fact to obtain, develop and utilize the evidentiary material on the original trial that is now unjustifiably claimed to be newly discovered or to have been suppressed or concealed by the prosecution.

6. The exhibits that were turned over during the trial by the prosecution to the defense in accordance with the Court's rulings (all of which rulings were fully carried out by the prosecution) disclosed plainly and substantially the material and relevant facts that are contained in the following defendant's exhibits marked for identification upon the hearing of this motion for a new trial. Exhibits H, I, K, L, M, X, Y, Z and AA. If the defense had acted with reasonable diligence upon the information disclosed to it by the exhibits turned over to it by the prosecution during the trial, the defense would have been able (if so

advised) to have presented during the trial the facts that it now claims are newly discovered.

GENERAL CONCLUSIONS OF LAW.

The decisions dealing with "disclosure" and "suppression" of material evidence cannot usefully be considered en masse. See, generally, Comment, *The Duty of the Prosecutor to Disclose Exculpatory Evidence* (1960) 60 Col. L. Rev. 858; Note, *The Attorney's Duties of Disclosure* (1957) 31 St. John's L. Rev. 283.

An analysis of the authorities in their proper categories serves to place in proper focus the principles controlling the case at bar.

I.

A new trial or a writ in the nature of habeas corpus or *coram nobis* will be granted where the prosecutor has deliberately suppressed material facts under circumstances amounting to fraud or overreaching of the defendant.

Pyle v. *Kansas* (1942) 317 U. S. 213 [state prosecutor used perjured evidence, knowing the evidence to be perjured, and also deliberately suppressed evidence favorable to defendant by coercing and intimidating potential defense witnesses. Defendant's application for a writ of habeas corpus had been denied without a hearing or opinion below. The Supreme Court reversed the affirmance of the denial of the habeas corpus application and remanded for further proceedings].

Wilde v. *Wyoming* (1960) 362 U. S. 607 [the Supreme Court remanded the case for a hearing, where defendant in a murder prosecution asserted that the prosecutor "wilfully suppressed the testimony of two eyewitnesses to the alleged crime which would have exonerated" him].

United States v. *Heath* (D. Hawaii 1957) 145 F. Supp. 877, appeal dismissed (9th Cir. 1958) 260 F. 2d 623 [indictment dismissed where Government agents lost defendant's corrected accounting records, in a tax evasion prosecution].

Curran v. *Delaware* (3d Cir. 1958) 259 F. 2d 707, 713 [police officers destroyed a statement of defendant in a rape case].

Woolomes v. *Heinze* (9th Cir. 1952) 198 F. 2d 577, 579, cert. denied 340 U. S. 89 [dictum *re* "connivance or actual fraud by the prosecution"].

United States v. *Baldi* (3d Cir. 1952) 195 F. 2d 815, cert. denied 345 U. S. 904 [deliberate suppression of vital evidence by an assistant district attorney who had urged a witness to omit certain facts in his testimony and who remained silent when the court charged the jury that the prosecutor had called all witnesses he could find, a statement that was untrue to the prosecutor's knowledge];

People v. *Hoffner* (Co. Ct. Queens Co. 1952) 208 Misc. 177, 122 [writ of *coram nobis* granted in a first-degree murder case where the only prosecution witness who positively identified the defendant on the trial as the hold-up man testified on cross-examination that he had failed to identify defendant the first time he saw him in the police line-up because he could not and did not look at the defendant's profile on that first occasion whereas, in truth, the minutes of the police line-up proceedings clearly established that the witness did have a profile view of all those in the line-up at which he failed to identify the defendant] ["the duty of revelation existed under the singular facts of this case, particularly since the unproffered minutes of the line-up go to the very heart of the only issue in the case, to wit: identification • • •"].

See *United States* v. *Doe* (3d Cir. 1955) 221 F. 2d 763, 768, 769; *Application of Landeros*, (D. N. J. 1957) 154 F. Supp. 183, 185-187; *United States* v. *Rutkin*, (3d Cir. 1954) 212 F. 2d 641, 644, 645.

II.

A new trial or other appropriate relief will be granted to a defendant where a prosecution trial witness commits perjury to the knowledge of the prosecutor who takes no step to disclose the perjury to the court and the defense.

Napue v. *Illinois* (1959) 360 U. S. 264;
United States v. *Rutkin* (3d Cir. 1954) 212 F. 2d 641;
United States v. *Ragen* (N. D. Ill. 1949) 86 F. Supp. 382;
People v. *Savvides*, 1 N. Y. 2d 554 (1956).
See *Dunn* v. *United States* (6th Cir. 1957) 245 F. 2d 407, 408.

Cf. *Price* v. *Johnston*, 334 U. S. 266 (1947) [where, on an application for a writ of habeas corpus, it is charged that the conviction was obtained by the prosecution's knowing use of false trial testimony and the charge is not denied by the Government (334 U. S. at 275, 288, 292), it is error for the district court to dismiss the application without a hearing.]

Communist Party v. *Control Board* (1956) 351 U. S. 115 [while a proceeding to review an order of the Subversive Activities Control Board was pending before the Court of Appeals for the District of Columbia, the petitioner (Communist Party of the United States) moved for leave to adduce additional evidence that the petitioner had newly discovered subsequent to the administrative proceeding. The motion was denied by the Court of Appeals. The newly discovered evidence would establish that three Government witnesses had committed perjury in other cases involving substantially similar subject matter and that said witnesses were professional perjurers. "The Government did not deny these allegations" (351 U. S. at 121). The Supreme Court called this an "uncontested challenge of perjury" (351 U. S. at 123, 124). The Supreme Court remanded the case to the administrative agency to resolve the charges of taint, and to make a fresh determination on the merits, if taint were found:]

III.

A new trial will be granted where the prosecutor negligently suppresses helpful defense evidence in violation of the court's order to turn over the documents containing

such evidence and the existence of such suppressed documents was discovered by the defense after trial. *United States v. Consolidated Laundries Corporation* (2d Cir. 1961) 219 F. 2d 563.

IV.

A new trial will be ordered where the prosecutor fails to call the trial judge's attention to portions of a Government witness' grand jury testimony containing inconsistencies with the witness' trial testimony, as a consequence of which the defense is denied adequate opportunity to cross-examine and impeach the witness. *United States v. Zborowski* (2d Cir. 1959) 271 F. 2d 661. Cf. *People v. Schainuck* (1943) 286 N. Y. 161, 165-166.

V.

A new trial will be granted in light of the post-trial recantation by an important prosecution witness where the defense did not have the opportunity to meet the false testimony during the trial.

United States v. Klaus (S. D. N. Y. 1955) 130 F. Supp. 412 [motion for new trial granted as to two defendants (Trachtenberg and Charney) who were unable during the trial to meet the false testimony; motion for new trial denied as to those defendants who failed to show that they could not meet the false trial testimony during the trial].

VI.

The granting of relief to the prosecution, where there has been post-trial discovery by the Government of a defense witness' trial perjury attributable to the defendants' fraud, is illustrated by *United States v. The Shotwell Manufacturing Company* (1957) 355 U. S. 233 [Government's motion to remand granted by the Supreme Court where evidence of a perjurious record attributable to the fraud of the defendants came into the Government's possession after the Government had petitioned for certiorari].

VII.

A new trial will be granted upon the prosecution's motion where there has been post-trial discovery by the Government of a key prosecution witness' lack of credibility or perjury committed at the trial. *Mesarosh* v. *United States* (1956) 352 U. S. 1. [after certiorari had been granted (in a case where defendants' conviction had been affirmed), the Government moved in the Supreme Court to have the case remanded to the district court on the ground that a key Government witness had given testimony in other proceedings before other tribunals and that the Government "now has serious reason to doubt the truthfulness" of the witness in those proceedings (352 U. S. at 4). The defendants moved for a new trial. The Supreme Court found that—regardless of whether the witness' untruthfulness constituted perjury or was caused by a psychiatric condition—the witness' "credibility has been wholly discredited by the disclosures of the Solicitor General" (352 U. S at 9); and the Supreme Court ordered a new trial].

VIII.

A motion for a new trial in a criminal case will be granted with caution and only in exceptional circumstances.

United States v. *Johnson* (1946) 327 U. S. 106, 111;

United States v. *Costello* (2d Cir. 1958) 255 F. 2d 876, 879, cert. denied 357 U. S. 937; rehearing denied 358 U. S. 858;

United States v. *Hiss* (S. D. N. Y. 1952) 107 F. Supp. 128, 136-137, aff'd on opinion below, 201 F. 2d 372 (1953), cert. denied 345 U. S. 942 (1953);

Weiss v. *United States* (5th Cir. 1941) 122 F. 2d 675, 691;

Cf. *United States* v. *Shotwell Manufacturing Co.* (1957) 355 U. S. 233, 242 ["A convincing showing is of course necessary to bring these principles into play."

IX.

In determining a motion for a new trial, the court possesses wide discretion.

United States v. *On Lee* (2d Cir. 1953) 201 F. 2d, 722, 723, cert. denied 345 U. S. 936;

United States v. *Troche* (2d Cir. 1954) 213 F. 2d 401, 403-404; and see dissenting opinion of Frank, C. J. at 404;

United States v. *Scuff* (E. D. N. Y. 1921) 274 F. 629, 630 ["A motion for a new trial, which is peculiarly addressed to the discretion of the court" was granted where the concept of "newly discovered evidence" was applied to the following fact-situation: after the jury found defendant guilty of bribing the prosecution witness but before defendant was sentenced, the prosecution witness was indicted for extortion. The district judge imposed sentence on the defendant and granted a stay of execution of sentence, in order that defendant might have an opportunity to move for a new trial in the event that the prosecution witness should be convicted. That witness was thereafter tried and convicted. The district judge thereupon granted defendant's motion to set aside the verdict and for a new trial.];

Cf. *Communist Party* v. *Control Board* (1956) 351 U. S. 115, 125 ["the Board has ample scope of discretion in passing upon petitioner's motion."].

X.

The burden of proving grounds to support the motion for a new trial is on the defendant.

United States v. *Cipolla* (2d Cir. 1958) 255 F. 2d 876, 877;

United States v. *Wolfson* (2d Cir. 1951) 190 F. 2d 687, 688 ["the burden of showing of due diligence on the part of the appellant"];

Darcy v. *United States* (1956) 351 U. S. 454, 462 ["While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' (Citing cases)"].

XI.

A motion for a new trial will be denied where the defense fails to prove its due diligence to secure, before or during the trial, the allegedly newly discovered evidence

United States v. *Flynn* (S. D. N. Y. 1955) 130 F. Supp. 412, 421;

United States v. *On Lee* (2d Cir. 1953) 201 F. 2d 722, 723, no. 3;

United States v. *Costello* (2d Cir. 1958) 255 F. 2d 876, 879-881;

United States v. *Hiss* (S. D. N. Y. 1952) 107 F. Supp. 128, 135-136, aff'd on opinion below, 201 F. 2d 372 (1953), cert. denied 345 U. S. 942 (1953);

Cf. *Green* v. *United States* (1st Cir. 1958) 256 F. 2d 483, 484, cert. denied 358 U. S. 854 (1958) [where the asserted knowledge of the prosecutor's subornation of perjury by a Government witness had been known to the defendant before he went to trial but his lawyer, though informed thereof, did not press the issue during trial].

Cf. *Nardone* v. *United States* (1939) 308 U. S. 338, 342 ["and if such a claim (illegally obtained evidence) is made after the trial is under way, the judge must likewise be satisfied that accused could not at an earlier stage have had adequate knowledge to make his claim. The civilized conduct of criminal trials cannot be confined within mechanical rules"].

XII.

Where the allegedly newly discovered evidence was known to the defense or readily obtainable by it before or during the trial and the defense trial strategy was not to utilize such known or obtainable evidence during the trial, the decision by the defense to change its strategy after an unfavorable verdict does not render the evidence "newly discovered."

United States v. *Costello* (2d Cir. 1958) 255 F. 2d 876, 879-881;

United States v. *Sobell* (2d Cir. 1957) 244 F. 2d 520, 524, cert. denied 355 U. S. 873 (1957), rehearing denied 355 U. S. 920;

United States v. *Capece* (2d Cir. 1961) 287 F. 2d 537, 537, no. 1;

United States v. *Peller* (S. D. N. Y. 1957) 151 F. Supp. 242, appeal dismissed 246 F. 2d 537 (1957);

Application of Landi (D. N. J. 1957) 154 F. Supp. 183, 197, 198 ["Petitioner is in effect arguing that, on a second go-round, he would do much better. Perhaps so. * * * nowhere in the record is there any indication that petitioner sought to examine police records pertaining to himself. * * *"];

Cf. United States v. *Gaddis* (2d Cir. 1958) 252 F. 2d 664, cert. denied 356 U. S. 968 (1958), rehearing denied, 287 F. 2d 637 (1961) (Jacob W. Friedman, the attorney of record in the case at bar, was the attorney for the defendants-appellants) [Chief Judge Lumbard said (252 F. 2d at 668): "A study of the record reveals that the defense had the means of securing information as to Berner's whereabouts and it chose not to secure the information"];

Cf. Green v. *United States* (1st Cir. 1958) 256 F. 2d 483, 484, cert. denied 358 U. S. 854 (1958) ["It will not do to say that the matter could not have been disclosed at the criminal trial without the personal testimony of Green who, as the criminal defendant, was

privileged not to testify. No doubt he was so privileged, as we may acknowledge without being obliged at the same time to affirm that his action in invoking the privilege had in it any elements of nobility. But Green cannot have it both ways. He cannot withhold the evidence, gambling on an acquittal without it, and then later, after the gamble fails, present such withheld evidence in a subsequent proceeding under 28 U. S. C. §2255."];

Cf. *United States ex rel. Reid* v. *Richmond* (2d Cir. 1961) F. 2d [per Lumbard, Ch. J.: "Every defendant must, of course, be accorded a fair trial. But the state is also entitled to a fair trial. When, after an extended hearing, informed and experienced defense counsel has taken a position, and the state, in reliance on it, has tried its case accordingly, it would be unduly tipping the scales of justice against the state to permit a defendant to argue that his conviction must be vacated because his counsel should not have taken the position he did and should not have made the concessions on which the state acted. * * * Whatever may have been the reasons for the course taken by Reid and his counsel, it was a conscious reasoned choice made by counsel who was experienced in the ways of the criminal law. * * * The trial strategy had much to commend it; that it failed does not entitle Reid to a second chance. Regrettable as hindsight may prove the choice to have been, Reid must be bound by what his lawyers did * * *."];

Palakiko v. *Harper* (9th Cir. 1953), 209 F. 2d 75, 95, cert. denied 347 U. S. 956 (1954) [Court rejected defense claim that the prosecution at the trial had concealed from the defendants the negative results of a certain FBI laboratory report. "* * * the fact that an analysis had been undertaken was disclosed by the prosecution at the trial. There is nothing to show that counsel for the defendants * * * sought or were denied any opportunity to inspect the report."];

United States v. *LaVallee* (N. D. N. Y. 1960) 188 F. Supp. 470, 473 [the Court rejected the defense claim that the district attorney had suppressed the evidence of an eyewitness, a mailman. The trial testimony had disclosed the presence of that eyewitness at the scene of the robbery. "It is clear that notice was given to the defense and they had all the power of court process to call this mailman if they so desired."];

Cf. *Taylor* v. *United States* (8th Cir. 1956) 229 F. 2d 826, 833-834, cert. denied, 351 U. S. 986 (1956);

United States (1954) 347 U. S. 263, 268 [whether the state notes, turned over to a defendant pursuant to Title 18 U. S. C. 3500, may be useful for purposes of impeachment is a decision which rests, of course, with the trial court itself];

DeBridge v. *United States* (D. C. C. A. 1958) 262 F. 2d 740 [the fact of newspaper publication of a precise amount of money reportedly stolen in a robbery was a vital and disputed issue. The prosecution told the jury that there had been no such newspaper story. The defendant was convicted in a one day trial. Six days later a motion for a new trial was filed when the defendant's lawyer discovered at the Library of Congress two full newspaper pages containing the article as had been claimed by the defendant. The court granted a new trial because "it is too much to require that under the circumstances counsel should have anticipated the key part to be played by the newspaper incident in the prosecutor's attack on DeBridge and thus should have searched the files in the Library of Congress upon such speculation. The public files of the trial was not an obvious or readily available fact, a technicality, or a point of law."].

It is evident from the above that a new trial will not be granted to enable the defeated party to offer "witnesses of whose existence he had known and who were available" at the time of the trial. V. The Talmud (London, Soncino ed., 1935) Sanhedrin I, chap. III, 195-196; Cohen, Everyman's Talmud (1949) 312.

XIII.

Defining the "primary duty of a lawyer engaged in public prosecution," the Canons of Professional Ethics, Canon 5 pertinently provides:

> "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. He should avoid oppression and injustice of any kind whatsoever. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is a public wrong."

It has been said that "the special problems pertaining to the ethical standards for prosecutors is in itself a major undertaking." Thode, *The Ethical Standard for the Advocate*, 39 Texas L. Rev. 575, 579 (1961). One may debate how to accommodate the competing social values of the prosecutor's dual role as a partisan advocate and as an impartial judicial officer. Cf. J. Edward Lumbard, the Lawyers' Responsibility For Due Process And Law Enforcement, 12 Syracuse L. Rev. 431 (1961).

However, the Supreme Court and the Court of Appeals for this circuit have, in effect, applied the rationale of Canon 5 in defining the standards of conduct that the United States Attorney must observe in a criminal case.

In *Berger v. United States* 295 U. S. 78 (1935), the Court said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he

may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (295 U. S. at 88)

In *Berger*, the Court pointed out:

"During the trial, the United States Attorney who prosecuted the case for the government was guilty of misconduct, both in connection with his cross examination of witnesses and in his argument to the jury, the particulars of which we consider at a later point in this opinion" (295 U. S. at 80).

In *United States v. Zborowski* (2d Cir. 1959) 271 F. 2d 661—where the prosecutor failed to call the trial judge's attention to portions of the prosecution witness' grand jury testimony that contained inconsistencies with the witness' trial testimony, and the trial judge therefore did not read the grand jury minutes, despite a request by defense counsel that he read the minutes—the Court of Appeals said (at 668):

"The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuring a conviction. Berger v. U. S., 1935, 295 U. S. 78, 88."

In *United States v. Consolidated Laundries Corporation* (2d Cir. 1961) 291 F. 2d 563—where the prosecutor negligently suppressed helpful defense evidence in violation of the court's order to turn over documents containing such evidence and the existence of such documents was discovered by the defense after the trial—the Court of Appeals (at 571) quoted the above statement from the *Zborowski* case.

The Court of Appeals in *Zborowski* and in *Consolidated Laundries* said that it was discharging its "duty as an appellate court to supervise" "the correct administration of criminal justice in the federal courts" (291 F. 2d at 571) by enforcing "standards of fair play in federal criminal proceedings" (271 F. 2d at 668).

What the Court of Appeals said in *Zborowski* and what it reiterated in *Consolidated Laundries* with respect to the prosecutor's duty of "full disclosure" cannot be fully appreciated unless the language is read in its factual context. This is not to suggest that what the Court of Appeals said in *Zborowski* and *Consolidated Laundries* should be read meticulously as technical language or construed narrowly as confined to the particular facts in those two cases that framed the issue therein for decision. On the contrary, the high purpose of ensuring fundamental fairness in federal criminal justice illumines every phrase and requires trial courts to recognize the language as formulating a directing principle and basic guide. Nevertheless, what was said is a compass, not a detailed map.

The issue in the present case is not one of principle or policy but of the application of recognized principle and policy to the particular circumstances disclosed by this record.

Specific Conclusions of Law.

Applying the foregoing rules to the record herein, the Court reaches the following specific conclusions:

1. The Government did not withhold, suppress or conceal any facts, testimony or documentary evidence which the defendant was entitled to receive or have disclosed to him.

2. The Government's conduct comported with all controlling constitutional and other standards and criteria of fairness, propriety, ethics, and due process.

3. There was no wilful, negligent, inadvertent or other violation of any rights of the defendant committed by the Government by any act of commission or omission.

4. The defendant has failed to establish any basis for a new trial. A new trial is not required in the interest of justice. A new trial is not required on the asserted ground of newly discovered evidence.

5. In deciding this motion, the Court has exercised its discretion and judgment in light of the legal principles hereinabove considered and in accordance with the total factual record, including the knowledge gained from presiding at the trial.

6. The defendant's motion for a new trial is hereby denied in all respects. So ordered. This order shall be effective immediately.

Motion under Rule 15, F. R. Crim. Pro. to take the deposition of a witness (Dr. Hans Hirschfeld) now in Germany, for use upon the hearing of this motion for a new trial. Denied.

Opinion.

The Court will proceed to decide the application made by Mr. London (defendant's attorney) to take the deposition of Dr. Hans Hirschfeld.

The motion was made orally on the record as appears in the transcript of the proceedings on the motion for a new trial (pages 40 to 44).

No question is raised by the Government as to the form of the motion. The Court will accept the application as having been made with the same force and effect as if a formal set of motion papers had been submitted.

The motion is made by the defendant pursuant to Rule 15 of the Federal Rules of Criminal Procedure.

Both sides recognize that an order permitting depositions to be taken in a criminal case rests within the sound discretion of the Court, a discretion which must be exercised in accordance with established standards and criteria.

There are numerous cases in this area of the law. In some, the motion to take a deposition under Rule 15 was granted.

United States v. *Cameron*, 15 F. 794 (E. D. Mo. 1883);
Young Bark Yau v. *United States*, 33 F. 2d 236 (9 Cir. 1929);
United States v. *Hofmann*, 24 F. Supp. 847 (S. D. N. Y.) 1938;
Bistram v. *United States*, 248 F. 2d 343 (8 Cir. 1957).

In other cases, the motion to take a deposition was denied.

Tom Ung Chai v. *Burnett*, 25 F. 2d 574 (9 Cir. 1928);
United States v. *Dockery*, 50 F. Supp. 410 (E. D. N. Y. 1943);
United States v. *Ausmeier*, 5 F. R. D. 395 (E. D. N. Y. 1946);
United States v. *Glessing*, 11 F. R. D. 501 (D. Minn. 1951);
Heflin v. *United States*, 223 F. 2d 371 (5 Cir. 1955);
United States v. *Broker*, 246 F. 2d 328 (2 Cir. 1957);
United States v. *Grado*, 154 F. Supp. 878 (W. D. Mo. 1957);
United States v. *Bentvena*, 60 Crim. 436 (S. D. N. Y. 1960).

The Government and defense counsel have submitted memoranda of law in which the leading cases in this area of the law have been briefed and analyzed. The Court has given close attention to the briefs, has read all the cases cited by counsel, and has conducted independent research into the issues raised by the motion at bar.

In our jurisprudence, the theological sanctity of a witness's oath or the ethical obligation of his affirmation is reinforced by the legal sanction of the law of perjury. To stipulate in advance that a witness whose testimony is sought will be given immunity against arrest here for his possible perjury would stultify the administration of justice. By destroying the legal significance of the witness's oath or affirmation, such a stipulation would make the witness a law unto himself, with only such conscience as he may possess as his guide.

This Court is being asked to authorize the deposition of a witness abroad because the witness, who is otherwise able and willing to testify, declines to come to the United States solely for the asserted reason that he desires an assurance of immunity against arrest here should the duly constituted authorities conclude that his testimony is perjurious. (Transcript of Hearings on Motion for New Trial, pages 296-306, 345-355, 356-359; Court's Exhibit IV.)

Defendant's "Memorandum of Law with respect to the application for an order directing that the testimony of Dr. Hans Emil Hirschfeld be taken by deposition", page 1, declares: "Dr. Hirschfeld is unwilling to come to the United States unless he receives assurances that the Department of Justice is unwilling to give."

For reasons already indicated, to enter into such a bargain with a prospective witness would be a travesty of justice.

Rule 15(a) of the Federal Rules of Criminal Procedure explicitly declares, among other things, that the Court may order that a prospective witness's testimony be taken if it appears that he "may be unable to attend or prevented from attending * * * and that it is necessary to take his deposition in order to prevent a failure of justice."

It has been represented to the Court that Hirschfeld is anxious to attend before this Court and that he would be able to come here. There is no aspect of physical or economic disability or inability. There is no claim of financial hardship on the witness or the defendant.

Thus, it does not appear that Hirschfeld is unable to attend or that he is prevented from attending. Nor can it be argued reasonably that acceptance of the terms and conditions proposed on behalf of Hirschfeld is necessary "in order to prevent a failure of justice."

On the contrary, to accept such proposed terms and conditions would promote rather than prevent a failure of justice.

Since it clearly appears that some of the essential conditions prescribed by Rule 15 do not exist, the defendant has not established the minimal prerequisites for obtaining leave to take the proposed deposition.

Neither the Court nor counsel have found any decision in which a court ordered the taking of a witness's deposition under circumstances resembling the particular facts of the present case.

Aside from the circumstances already specifically alluded to by the Court, the total record demonstrates that the defendant's application to take Hirschfeld's deposition is devoid of merit. Measured by established standards and criteria of judicial discretion, the evidence submitted in behalf of the defendant does not warrant the exercise of the Court's discretion in favor of the defendant's application.

The other testimonial aspects of Hirschfeld in the context of the total record will be discussed by the Court in its opinion upon the decision of the motion for a new trial.

A close and careful analysis of the entire record requires the Court to deny the defendant's motion to take Hirschfeld's deposition.

So ordered.

APPENDIX B.

Opinion of the United States Court of Appeals for the Second Circuit.

Before:

L. HAND, *Chief Judge*,

SWAN and WATERMAN, *Circuit Judges*.

SWAN, *Circuit Judge*:

The indictment alleges that the conspiracies began in January 1946 and continued to the return of the indictment on November 29, 1950. Eighteen co-conspirators were listed but were not made defendants. The trial began June 19, 1951, was concluded July 13, and sentence was imposed on August 7—ten years on count 1 and five imprisonment on count 2. Defendant duly appealed and is free on personal bail.

On October 9, 1951 defendant moved under Rule 33, F. R. Cr. P. for a new trial on newly-discovered evidence. After hearing witnesses Judge Herlands wrote a lengthy opinion denying the motion on November 5. Defendant has also appealed from this order.

The appellant presents four points: (1) insufficiency of the evidence to sustain the conviction; (2) count 1 was barred by the statute of limitations; (3) error in admitting prejudicial testimony; and (4) error in denying the motion for a new trial.

(1) *Alleged insufficiency of the evidence.*

Defendant did not testify nor did he call any witness. He was represented by two experienced trial lawyers. Their strategy was to endeavor by cross-examination of witnesses for the prosecution to prove that the conspiracy, if any, in which defendant took part did not involve getting information about the *national defense* of the United States, but about the Trotskyite wing of the Party Mensheviks, and Germans, living in the United States. Counsel seem to have conceded that defendant was party to a conspiracy to obtain information for Russia respecting matters other

than national defense. At least there was no contradiction of testimony that he was paid $100 or $150 per month by co-conspirators for reporting to them during years prior to the time the conspiracy is claimed to have ended in 1945.

The first witness for the prosecution was defendant's brother Jack Soble. He was examined and cross-examined at great length. He testified to meeting Beria of the GPU (Russian Secret Service in 1940 and to being told by Beria that he wanted him and his brother, Robert, the defendant, "to go abroad to work for us to gather *any* information of *any* value to the Soviet Union." [Italics added.] The quoted purpose certainly cannot reasonably be construed to have excluded the gathering of national defense information. Beria did not say how they would go or where but offered to let their parents and relatives go with them because the parents are "anti-communists" and will be a "good cover." Of course Jack's conversation with Beria did not commit Robert to the conspiracy, but shortly thereafter Jack visited his brother in Lithuania and learned from him that agents of the GPU had made him a similar proposition. Jack also testified to their leaving Russia via Vladivostok, getting to the United States via Japan and meeting in New York City various "contacts" to whom they made reports. According to Jack's testimony Robert's contact "was Zubilin's wife Helen. He told me this many times on several occasions."[1] He further testified that he had many conversations with Robert "about my work in the Trotskyite field, and his work in the O. S. S."

Mrs. Beker, also listed as a co-conspirator, testified that the defendant caused her to meet Dr. Hirschfeld, head of an O. S. S. section compiling information on European politicians, and told her Hirschfeld worked for the O. S. S.; that she received written reports from him in 1943, 1944 and the early months of 1945 which she passed on to the defendant; that Hirschfeld reported on what some of his co-workers in O. S. S. were doing and the last two or three reports referred to an important military weapon being

[1] Both Zubilin and his wife were listed in the indictment as co-conspirators.

developed in the far west. Thus there was testimony that the conspirators infiltrated the O. S. S. and secured information from persons working there. That information obtained from O. S. S. employees was classified as secret was demonstrated by the testimony of Mr. Doering, general counsel of O. S. S.

The fact that the source of the information was classified as secret distinguishes this case from *United States* v. *Heine*, 2 Cir., 151 F. 2d 813, cert. den. 328 U. S. 833, upon which appellant places reliance. Moreover, the information as to how the O. S. S. carried on its work and who did what was in itself a matter of national defense, as was also the information with respect to the development of an important military weapon in the far west, as to which Mrs. Beker testified. Her testimony, if credited, was alone enough to justify the verdict. *Gorin* v. *United States*, 312 U. S. 19, affirming, 9 Cir., 111 F. 2d 712 is a leading case on the Espionage Act. There, affirming a conviction for transmitting Naval Intelligence reports on Japanese agents in the United States, the Court said, at page 32:

> "It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined."[2]

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[2] Judge Herlands charged the jury as follows:

> "Whether or not the information and documents allegedly sought to be obtained and transmitted by the defendant and his alleged co-conspirators concerned, regarded or was connected with the national defense is a question of fact solely for the determination of you, the jury, taking into consideration all the circumstances of the alleged crime and considering the alleged source, origin, character and utility of the information and documents. * * * You may also consider the testimony that the names of certain personnel and their functions within O. S. S. were classified information.
>
> If you find that the only information or documents which the defendant allegedly gathered and transmitted in this case were lawfully accessible to anyone who was willing to

We are satisfied that appellant's point (1) must be overruled.

(2) *The statute of limitations.*

The appellant contends that prosecution of the conspiracy charged in count 1 is barred by the statute of limitations and that submission to the jury of the barred count requires reversal of the conviction under count 2. Whether or not prosecution under count 1 was barred presents a serious question, but we see no necessity for determining it. Concededly there was no statute of limitations applicable to count 2, and on this count defendant was sentenced to life imprisonment. The sentence imposed on count 1 did not increase defendant's term of imprisonment. Hence, if the count 2 conviction is sustainable, we need not consider the error alleged as vitiating count 1. *Barenblatt* v. *United States*, 360 U. S. 109, 115; *United States* v. *Bronson*, 2 Cir., 145 F. 2d 939, 944. And the same rule has been applied in prosecutions for espionage. *Abrams* v. *United States*, 250 U. S. 616, 619; *Pierce* v. *United States*, 252 U. S. 239; *Gorin* v. *United States*, 9 Cir., 111 F. 2d 712, 722, affirmed 312 U. S. 19.

Assuming *arguendo* that count 1 was barred by the statute of limitations, we cannot see how submission to the jury of that count constituted such prejudicial error as to require reversal of count 2. Appellant has pointed out no proof with respect to count 1 which was not equally admissible with respect to count 2, as was the case in *Flanister* v. *United States*, 5 Cir., 260 F. 2d 513, on which appellant relies. The obtaining of information for the U. S. S. R. (the conspiracy charged in count 1) was a necessary prerequisite to transmitting it (the conspiracy charged in count 2).

(3) *Alleged errors in admitting prejudicial testimony.*

Appellant contends that the trial court committed reversible error in admitting prejudicial testimony relating to

take the pains to find, sift and collate it or them, then the defendant would not be guilty of transmitting or obtaining and receiving national defense information."

defendant and relating to criminal conduct and political activity of the alleged co-conspirators during the periods before the conspiracies began and after they terminated.

Objection was made to the admission of Jack Soble's testimony that he and his brother Robert were members of the Trostkyite wing of the German Communist Party in 1919, when they were studying in Germany. In our opinion there was no impropriety in receiving evidence of the conspirators' activities prior to the beginning of the conspiracy charged in the indictment. The evidence was relevant background to the prosecution's case, to show the motivation and community of interest of the conspirators. How far back one may go is largely a matter within the discretion of the trial judge. *See United States* v. *Dennis*, 2 Cir., 183 F. 2d 201, 231; affirmed, 341 U. S. 494. We see no abuse of discretion. Judge Herlands' instructions made it clear to the jury that the evidence was to be considered only for the above-stated purpose, and that the defendant was not on trial for his pre-1940 activities.

As to testimony concerning post 1945 events, appellant complains of testimony by Jack Soble that in 1957 he, his wife and Albam, all members of the alleged conspiracy, pleaded guilty to charges of espionage. When Soble took the stand, the prosecutor immediately brought out that he was serving a seven year sentence for espionage of which he had been convicted in 1957 upon a plea of guilty. Counsel for defendant made no objection to this testimony, doubtless because they thought it would impair with the jury his credibility as a witness. On direct examination he was asked no question to which the answer would bring out that his wife and Albam had been indicted with him and had also pleaded guilty. He volunteered this information with respect to Albam. However, no objection or exception thereto was taken by the defendant, and the first questions put to Soble on cross examination brought out that his wife and Albam were indicted with him, pleaded guilty and received prison sentences. Under these circumstances we do not think defendant can complain of the testimony as such plain error that we should notice it notwithstand-

ing his failure to object, 52(b) F. R. Cr. P. Cf. *United States* v. *Grabina*, 2 Cir., 295 F. 2d 792.

A more serious error is alleged in the admission of hearsay testimony relating to conversations after 1945, particularly those between Jack Soble and various Russians in 1947. The exception to the hearsay rule, allowing co-conspirators to testify to out-of-court statements, extends only to statements made during the life and in furtherance of the conspiracy; to admit hearsay of conversations after the conspiracy is over is error. *Krulewitch* v. *United States*, 336 U. S. 440 (1949). The government contends that the 1947 conversations were offered to prove the continuance of the conspiracy. But that, after all, is the disputed fact. Until and unless it is proven that the conspiracy extended past 1945, hearsay subsequent to that time is inadmissible. Especially where, as here, defendant strongly contends that the conspiracy expired at an earlier date, great care must be exercised to prevent confusion between the *purpose* of introducing the evidence and its admissibility—which follows, not precedes, the proof of conspiracy.

This objection, however, can be made to all evidence of the acts and conversations of co-conspirators. As Justice Jackson said in *Krulewitch*:

> . . . . Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal* v. *United States*, 332

U. S. 539, 559, all practicing lawyers know to be unmitigated fiction." 336 U. S. 453 (concurring opinion).

However trenchant these criticisms, that question has been decided adversely to petitioner's position since the trial of Thomas Hardy, 24 How. St. Tr. 200 (1794); see Levié, *Hearsay and Conspiracy*, 52 Mich. L. Rev. 1159, 1162 (1954). And Judge Herlands gave the instructions required by law when he stated, in his charge to the jury, that:

> "* * * In considering whether or not defendant was a member of the conspiracy, you must do so—I repeat: in considering whether or not defendant was a member of the conspiracy, as to that particular element, you must do so *without regard to and independently of the statements and declarations of others.* In other words, you must determine the membership of defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the actions and conduct of others. However, once you have determined that defendant was a member of the conspiracy, if you so find, using this test, you may then consider as if made by him the statements and declarations of other co-conspirators, made in furtherance of the conspiracy and *during the existence* thereof as alleged." (Italics added.)

Since the jury must have found that the conspiracy continued past 1945 before it could consider the allegedly prejudicial testimony, to admit it was not error.

(4) *The alleged error in denying the motion for a new trial.*

Defendant's motion for a new trial, from the denial of which he also appeals, was based on two grounds. First, he urged that newly-discovered evidence, contradicting the prosecution witnesses, would probably prove his innocence, and hence was required "in the interests of justice," 23, F. R. Cr. P. Second, he claimed that the government, by suppressing exculpatory evidence, had violated elementary fairness and vitiated the trial.

The first piece of evidence claimed to have been suppressed by the government was a medical report concerning Jack Soble by prison physicians. As to this, defendant does not claim that the government hid the evidence, but only that it failed to bring it to the attention of the court and defense counsel. But the government several times referred to our decision in *United States* v. *Zborowski*, 2 Cir., 271 F. 2d 661, and to Jack Soble's part in that case. There we upset a conviction based on the same Jack Soble's testimony where the government had failed to disclose the reports and certain inconsistencies with grand jury minutes; hence all the facts of Jack's mental condition were, at the time of the trial, a matter of public record. And while the prosecution has the duty to disclose, on its own initiative, exculpatory facts within its exclusive control, *United States* v. *Zborowski*, *supra*, it has no such burden when the facts are readily available to a diligent defender. See, e.g., *United States* v. *Costello*, 2 Cir., 255 F. 2d 876; *United States* v. *Hiss*, S. D. N. Y., 107 F. Supp. 128, affirmed, 2 Cir., 201 F. 2d 372. Moreover, it seems obvious that defendant did know of his brother's condition; not only was he a psychiatrist who knew that his brother had attempted suicide, but his lawyers, in cross examination, questioned Jack closely about his marginal sanity. That the jury chose to believe Jack notwithstanding his condition is not our affair.

We see no merit in appellant's claim of error based on the prosecution's failure to disclose the whereabouts of Hans Hirschfeld, who was mentioned in Mrs. Beker's testimony. No principle of which we are aware requires the government to give the defense advance information of the location of persons who will be mentioned in the testimony of a witness for the prosecution. After Mrs. Beker testified, F. B. I. reports were made available which placed Hirschfeld in West Berlin and showed that he denied ever having known Mrs. Beker. This information was received close to the end of the trial, but defense counsel made no request for a continuance of the trial so that they might locate Hirschfeld and use him as a witness to impeach Mrs.

Beker's credibility. And we note that Hirschfeld, as a prominent aide to the West Berlin government, could have been located with a minimum of time and effort.

The second mass of evidence brought forth on motions for a new trial was testimony of persons working in O. S. S. with Hirschfeld, relating to the question of whether Hirschfeld had access to "national defense information." But, as Judge Herlands properly ruled, this evidence was not "newly-discovered." These witnesses were as available during trial as after it; their late appearance was dictated only by the trial strategy of defense counsel, who produced no witnesses or exhibits of their own, but only cross examined those of the prosecution. And as to the function of Hirschfeld's office in the O. S. S., they did not even cross examine Doering, the O. S. S. general counsel, at trial.

Further, the new testimony sought to be introduced was merely cumulative and impeaching and such evidence "ordinarily will not support a motion for a new trial." *Mesarosh* v. *United States*, 352 U. S. 1, 9; see *United States* v. *Rutkin*, 3 Cir., 208 F. 2d 647, 654. And even if the testimony of these new witnesses had been received and believed (thus contradicting the witness Beker), a different result could not be anticipated. Under *United States* v. *Gorin*, *supra*, defendant could be guilty even if the work of the biographical records section was as limited as they testified it was; and under the loose and shifting standards of conspiracy, Soblen could have been found guilty of conspiring to transmit secrets even if he had not succeeded. See *United States* v. *Abel*, 2 Cir., 258 F. 2d 485, affirmed, 362 U. S. 217. A new trial was properly denied.

For the foregoing reasons both appeals must fail.

We confess that the sentence of life imprisonment seems to us somewhat harsh but the sentence is a matter with which we may not concern ourselves since it does not exceed what the statute authorizes. Nor has the appellant argued that the sentence does concern us.

Accordingly the judgment of conviction and the denial of the motion for a new trial are both affirmed.

APPENDIX C.

Judgment Sought to be Reviewed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of March one thousand nine hundred and sixty-two.

PRESENT:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. THOMAS W. SWAN,
HON. STERRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT SOBLEN, a/k a ROBERT SOBLE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX D.

Opinion of the District Court at the Sentencing of Petitioner.

[REPORTED AT 199 FEDERAL SUPPLEMENT 11.]

[12] HERLANDS, District Judge.

Considerations of public interest and public policy suggest, in view of what has been said here this morning, that the Court review certain aspects of the proceedings in this case before imposing sentence.

The indictment was voted by a grand jury consisting of twenty-three citizens after investigation and the presentation of evidence.

In accordance with our American system of justice, the accusation of the defendant was not made by political functionaries or Government officials.

The names and addresses of the prosecution's witnesses were furnished to the defendant before trial, in accordance with the applicable statute.

The names and addresses of all persons on the jury panel were furnished to the defendant before trial, in accordance with the applicable statute.

Extensive medical hearings were held publicly before trial in order to determine the physical and mental fitness of the defendant to stand trial and to participate in the trial together with his counsel. The matter of the defendant's health was carefully considered at all stages of the proceedings.

A fair and impartial jury was selected with the appropriate participation of counsel.

Copies of pretrial statements of prosecution trial witnesses were furnished to the defendant, in accordance with the applicable statute.

A transcript of the grand jury testimony of Jack Soble was furnished to the defendant, in accordance with applicable legal principles.

A contour chair for the defendant's use during the trial was furnished to him in accordance with his request.

Appropriate recesses were granted to the defendant and his counsel both upon request and upon the Court's own initiative.

The defendant's constitutional and civil rights and privileges were safeguarded at all stages of the proceedings, including the charge to the jury.

The defendant's own counsel said (at pages 1634-1635 of the trial record):

"Mr. Brill: May I at this time state for the record that your Honor has been very zealous in protecting the rights of this defendant; that your Honor has been extremely fair, kind and courteous; that your charge was very fair.

"I say this to your Honor because I want your Honor to know precisely how the attorneys for the defendant feel about it, and how the defendant feels about it."

It is apparent from this review that the conduct of this case from start to finish offers a striking contrast between the enlightened methods of American justice and the methods employed in certain foreign countries. That contrast carries its own message far beyond the walls of this courtroom.

With respect to the sentence to be imposed, the following nine circumstances have shaped the Court's judgment:

1. Despite the fact that the defendant was accused of conspiring against this country, he was given the full measure of American justice.

2. The defendant's trial was conducted in an atmosphere free from passion or hysteria. The defendant's every constitutional and civil right was scrupulously protected.

3. The conspiracies in which the defendant participated were farflung in [43] their nature. They operated here

and abroad. They involved at least eighteen co-conspirators. They continued over many years. They were conceived by the Secret Police of Soviet Russia. They were characterized by stealth and cunning. Cryptonyms, couriers and the diplomatic cloak were part of the spy apparatus used. The conspiracies were executed through the active connivance and financial support of at least two high-ranking Soviet diplomats and their wives stationed in this country, Vassili Zubilin and Mikhail Chaliapin. These characteristics of the conspiracies made it difficult to expose and prove the full range of the conspiracies and the identities of all the conspirators.

4. The plan and the acts of the defendant and his co-conspirators were not an integral part of reconnaissance or intelligence operations carried on by members of any foreign power's air, military or naval representatives. On the contrary, the defendant and his family were permitted to enter the United States as civilian immigrants. This country opened its doors; gave the defendant the opportunity to earn a living, to move about without surveillance, and to enjoy the blessings of liberty and freedom.

In return, the defendant betrayed his benefactor.

5. The defendant's biography reveals him as a highly educated and intellectual individual, without a shred of loyalty in his makeup. He has not been faithful in any of his relationships. He has been disloyal to Lithuania, the country of his birth. He has been disloyal to his Trotskyite associates. He has been disloyal to the religious and ethical teachings of his forefathers.

6. The matter of the defendant's health has received the Court's close consideration before, during and after the trial. A spy is a spy no matter what his health may be.

7. The Court does not find any bona fide or substantial extenuating or mitigating circumstances in the defendant's favor.

8. The severity of the defendant's sentence must be consonant with the obvious character of the defendant's crime. A conspiracy to obtain and transmit American national defense secrets may imperil the lives of all Americans. Such a crime is, therefore, analogous to a conspiracy to commit mass murder.

9. To the extent that punishment of this defendant may have a deterrent effect on others contemplating espionage, the Court must mete out punishment that may serve to prevent similar crimes. The Court has a grave responsibility to protect the safety of our nation and its citizens.

Stern punishment is imperative.

The defendant is hereby sentenced on Count 1 to a term of ten years; and on Count 2 to a term of the defendant's natural life. The Court respectfully recommends to the Attorney General that the defendant serve said terms in the penitentiary at Springfield, Missouri, where there are medical and hospital facilities appropriate to the defendant's condition.[1]

---

[1] Motion to reduce bail pending appeal denied August 11, 1961.

APPENDIX E.

Constitutional Provisions and Statutes Involved.

CONSTITUTION OF THE UNITED STATES:

FIFTH AMENDMENT.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Title 18, United States Code (1958):

§ 793. GATHERING, TRANSMITTING, OR LOSING DEFENSE INFORMATION

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be

used to the injury of the United States or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal, station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions or other materials or instruments for use in time of war are being made, prepared, repaired, stored or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

* * * * * *

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain

it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter;

* * * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

Title 18, United States Code (1958):

§ 794. Gathering or Delivering Defense Information to Aid Foreign Government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

Act of June 25, 1948, ch. 645, Pt. II, ch. 213, § 3282, 62 Stat. 828*

§ 3282. OFFENSES NOT CAPITAL

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed."

Act of Sept. 23, 1950, ch. 1024, Section 19, 64 Stat. 1005

§ 19. PERIOD OF LIMITATION

An indictment for any violation of title 18, United States Code, section 792, 793, or 794, other than a violation constituting a capital offense, may be found at any time within ten years next after such violation shall have been committed. This section shall not authorize prosecution, trial, or punishment for any offense now barred by the provisions of existing laws.

* Enacted as § 3282 of Title 18, U. S. C. (1948 ed.). The present § 3282 of Title 18, U. S. C. was enacted in 1954.

Office-Supreme Court, U.S.
FILED
MAY 31 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 957

ROBERT SOBLEN

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

and

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Doctors Bernard Diamond, Max Pepper, Walter Bonime, Harry Klein, Wagner H. Bridger Joseph Wortis and Henry B. Richardson respectfully move this Court for leave to file the accompanying brief in this case as amici curiae. Consent of the attorney for the petitioner herein has been obtained, but the Solicitor General of the United States has refused to consent.

The applicants are psychiatrists. One of them, Dr. Bernard Diamond, is Chairman of the Committee on Law and Psychiatry of the American Psychiatric Association (although he does not purport to speak for that organization). The applicants have an interest in this case in that the issues herein involve mixed questions of law and psychiatry.

The case presents two basic questions of general importance, over and above the merits of the case itself: One, whether a person physically and mentally incapacitated (as was the petitioner herein) should be required to stand trial, especially in a capital case; and, second, whether a conviction should be permitted on the testimony of an individual who is admittedly a psychotic, as was the chief witness against petitioner. Reference to the details of this case is necessitated simply to establish that the points urged are actually presented herein.

The first of these legal-psychiatric questions grows out of facts which can be simply stated. Petitioner was found guilty by a jury in the Southern District of New York on a charge of espionage; he was sentenced to life imprisonment. Petitioner was forced to stand trial even though he was suffering from the dread disease of leukemia. He had, according to the Government's own medical expert, about a year to live. Petitioner's mental processes were so severely retarded by pain-killing and sleep-inducing sedation that he frequently fell asleep throughout the trial; when awake, he was in a somnolent state. These facts are elaborated in the proposed amici brief submitted herewith.

The remaining question also involves a mixture of law and psychiatry. The principal prosecution witness was the brother of petitioner. That witness was found, by a Government psychiatrist, to be in an aggravated state of psychosis, and not able to separate fantasy from reality. To recognize the fantasies of such a psychotic calls upon the highest skills of the science of psychiatry. Nevertheless, the trial judge left it to the twelve laymen, who constituted the jury below, to attempt to separate the truthful from the hallucinatory in the testimony of the psychotic witness.

The reason for apprehending that existing counsel in this cause may not adequately present the issues here suggested is that the questions lie on the boundary line between law and psychiatry. It is the conviction of the psychiatrists that a collaboration between the profession of law and that of psychiatry is necessary to achieve a result which is soundly rooted. It is the hope of psychiatrists submitting the amici brief that their contribution may assist this Court in coming to correct conclusions on issues of the first magnitude in the criminal law.

WHEREFORE, it is respectfully prayed that an order be made herein permitting the submission of the annexed amici brief.

Dated: May 29, 1962.

Respectfully submitted,

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Max Pepper, M.D.,
Walter Bonime, M.D.,
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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, practicing psychiatrists, who are vitally concerned with the interrelationship of law and psychiatry, wish to raise certain questions which arise in the case of the *United States* v. *Soblen* as they pertain to our shared concern.

The conviction of Dr. Robert Soblen, and his sentence to life imprisonment, raises, from a psychiatric point of view, two questions:

(1) Whether Dr. Soblen, a 61-year-old physician, fatally ill (in advanced state of lymphatic leukemia), was able to stand trial; and

(2) The conviction was based upon the testimony of Dr. Soblen's younger brother, Jack Soble, who was suffering from involutional psychosis and chronic brain syndrome. This raises the question whether the Government should be permitted to offer this type of testimony in a criminal case.

A. The first question with which we are concerned is whether the defendant's, Dr. Soblen's, physical condition and mental state at the time of the trial were such that he could both stand trial and participate with understanding in his own defense.

Dr. Soblen has been suffering from lymphatic leukemia since 1958 (commonly known as cancer of the blood) and was at the time of the trial already in the advanced stage.[1] When the case was reached for trial, Dr. Soblen's condition had deteriorated and he could not function in the courtroom without having heavy sedation and the administration of other drugs. Sedatives administered included demerol, thorazine, other tranquilisers and other analgesics. He was also on cortisone preparations both before and during the trial.

By the very nature of that form of leukemia, Dr. Soblen would have been frequently in great pain throughout the trial due to pressure of the enlarged spleen and enlarged liver. This made it frequently difficult for him to sit. Toward the end of the trial his condition worsened to such a degree that it was necessary for him to lie on a couch in the courtroom which he did by leave of court. He was in a sleepy state during a great part of the trial and was fre-

---

[1] Dr. Peter Vogel, the Government physician stated on pre-trial that the life expectancy of the defendant was somewhat over one year.

quently, even when awake, unable to follow the trial proceeding.

From the above description of the defendant and from existing knowledge of the deteriorating process of lym-

---

2 Mr. Brill: Your Honor, may I state for the record that the defendant now and then lapses into a sense of sleep, and that is because of his physical condition that your Honor is aware of. I just want the record to show that, and I want the jurors to be made aware that it is not out of disrespect to the Court or the jury. He does fall asleep now and then because of his illness, your Honor.

The Court: Well, I don't know why he fell asleep—

Mr. Brill: Your Honor, it is because of the serious illness that your Honor knows about that he suffers from.

The Court: Up to this point he participated in the discussion with counsel.

Mr. Brill: Yes, but he has lapsed into sleep, lapsed into sleep, your Honor, on several occasions. Counsel has just called it to my attention. He tried to nudge him and it was difficult to awake him.

The Defendant: I am sorry.

The Court: Do you want a recess now?

Mr. Brill: No. I want the jurors to know that when he does lapse into sleep that he is not being disrespectful either to the Court or the jury.

The Court: I know there is no disrespect intended on the part of anybody. I know he had his eyes closed. Whether he was asleep, I don't know. He is up now, anyway.

Mr. Brill: Yes, your Honor.

The Court: In the sense that his eyes are open.

Mr. Brill: During the course of the trial I may have to move and object, and make it a matter of record, your Honor.

The Court: All right. I will rely on the vigilance of counsel to see to it that somnolence does not interfere with the trial, and we will see to it that nobody falls asleep.

Mr. Brill: I am not interested in others; I am only interested in the rights of this defendant, your Honor, and preserving the record.

The Court: The record is preserved.

Mr. Brill: Thank you.

The Court: All right, proceed.

phatic leukemia, there is serious question as to the defendant's mental competency either to be tried or to participate adequately in his own defense. Medical evidence in cases of advanced lympathic leukemia demonstrates damage to brain tissue with concomitant damage to brain function.

Similarly, a patient under daily sedation and treated simultaneously with cortisone preparations and analgesics experiences reduced perception, with consequent impairment of normal intellectual functioning. It is to be expected that the defendant would be in a drowsy and sleepy state throughout the trial.

Both the deteriorating effects of the progressive leukemia on the brain functioning and the retarding impact of sedation, analgesics and other medication taken throughout the trial lead us to the conclusion that it would tend to make it difficult for defendant to follow the trial and reduce his acuity and his mental clarity to a point where he is unable to exercise the judgment required by the exigencies of such a trial. Especially in view of the gravity of, and the tensions inherent in, the grave accusations and the overhanging threat of capital punishment, defendant would have to be mentally alert to follow the evidence offered against him, and to be of assistance to his counsel. This is the more true since the prosecution testimony ranged over a period of 40 years.

The mental ability of defendant was wholly inadequate to meet the extraordinary demands which such a trial placed upon him. As examples, the trial placed upon defendant the necessity to follow the intricacies of the prosecution's evidence in order to enable defendant to assist his counsel to prepare his cross-examination.

Finally, and most important, was the necessity of defendant consulting with his counsel, on the critical question of whether or not the defendant should take the stand in his own behalf.[3] A somniferous patient is obviously unable to take such a judgment or to assist counsel to make such judgment under the conditions here depicted.

Under the circumstances, we feel that defendant was deprived of his day in court. While he was physically present, albeit in a horizontal posture, his state of mind, induced by required sedation, made him mentally absent. This would be so even in an ordinary case; it is much more true in a case involving the dramatic tensions of brother testifying against brother, of testimony covering a span of 40 years, and of circumstances which demanded a mind most alert, perceptive and vigilant.

B. The second question with which we are concerned is the reliability of the testimony of the chief witness for the Government, Jack Soble, the brother of the defendant.

Jack Soble has a long psychiatric history. We are informed that, according to record data, the behavior pattern and mental functioning of the complainant embody the following characteristics:

1. Severe and lasting depression which by 1957 attained psychotic proportion.

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[3] The Trial Court refused at the close of the People's case to grant Petitioner, who was not then in a mental and physical condition to make a decision, an over-night adjournment to decide whether he should testify in his own behalf.

2. Two suicide attempts in 1957 and 1958, one of them grotesque in nature, the witness swallowing a huge quantity of nuts and bolts.

3. Twenty electroshock treatments administered to him on separate occasions, in 1958 and 1959.

4. His irritable and hostile behavior during the trial of his brother, for which he had to be reprimanded and kept in control by the trial judge.

Dr. Donald Rinsley, a Government psychiatrist and a member of the staff of the Psychiatric Division of the Federal Prison at Springfield, Missouri, studied the complainant, Jack Soble, from April to June 1958, seeing him every other day. The Psychiatric Division's final diagnosis (as reported during the *Zborowsky* trial in 1959, wherein Jack Soble was a principal witness) is as follows:

> "The diagnosis that we made is called involutional psychotic reaction in partial remission and what we call chronic brain syndrome."
>
> * * * * * *
>
> "Jack Soble has in essence two illnesses—one is a severe depression and the other is an organic brain disease itself which we could ascribe to impairment or damage of his higher brain functions."

Dr. Rinsley further stated that the witness' illness was "of moderate to severe degree", and that on a scale of zero to ten (ten representing the worst), he would place Jack Soble between seven and eight.

With regard to the credence which should be given to this chief prosecution witness, Dr. Rinsley referred to the fact, not an uncommon concomitant of this type of mental con-

dition, that it was difficult to say where reality left off and fantasy began. In this Government psychiatrist's own words:

> "One of Jack Soble's difficulties has been difficulty with memory and one could expect that at times because of a deficiency in memory and because of the nature of his mental illness he is capable of filling in his gaps in memory with information which he believes to be true but which may not be true."

The condition above described may very well have been aggravated by the fact of intense sibling rivalry of Jack Soble, the younger brother, toward his elder sibling, defendant here. In these circumstances, the giving of testimony by an acknowledged psychotic against a brother, has peculiar and added significance.

CONCLUSIONS

1. Because of defendant's physical condition and accompanying mental state, defendant suffered impairment of his mental functioning to such an extent that he was in no condition to assume the necessary responsibility for participation in his defense;

2. A conviction carrying with it a sentence of life imprisonment should not be allowed to rest on the testimony of a brother whose mental condition has been described by a federal prison psychiatrist as involutional psychotic reaction and chronic brain syndrome. The veracity, ac-

curacy and validity of testimony from this source are open to very serious question.

Dated: May 29, 1962.

Respectfully submitted,

.....

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No. 957

In the Supreme Court of the United States

OCTOBER TERM, 1961

ROBERT SOBLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 55a) is reported at 301 F. 2d 236.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1962. On April 13, 1962, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including May 12, 1962. The petition for writ of certiorari was filed on May 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conspiracy charged in Count 1 was barred by the statute of limitations and, if so, whether the submission to the jury of Count 1 was prejudicial.

2. Whether the admission of evidence concerning events antedating the conspiracy and events occurring during the later stages of the conspiracy was reversible error.

3. Whether the evidence was sufficient to show that the purpose of the conspiracy was to obtain and transmit information related to the national defense.

4. Whether the trial court properly denied petitioner's motion for a new trial based on newly discovered evidence.

STATUTES INVOLVED

Sections 793, 794, and 3282 of Title 18, U.S.C. and Section 19 of the Act of September 23, 1950, 64 Stat. 1005, appear at pages 69a–72a of the appendix to the petition.

STATEMENT

Petitioner was indicted on two counts, each of which charged him with conspiring to violate the espionage laws. Count 1 charged petitioner and various co-conspirators with conspiracy to violate 18 U.S.C. 793 (a) and (c), in that they agreed to obtain information concerning the national defense of the United States—specifically, information relating to the personnel and activities of the Office of Strategic Services and other government intelligence operations—with intent and reason to believe that the information obtained would be used to the advantage of the Soviet Union. Count 2 charged petitioner and

the same co-conspirators with conspiracy to violate 18 U.S.C. 794(a), in that they agreed to transmit to the Soviet Union information relating to the national defense of the United States with intent and reason to believe that the information would be used to the Soviet Union's advantage. The indictment alleged the same 25 overt acts to have been committed in furtherance of the conspiracy charged in each count.

Petitioner was convicted on both counts and sentenced to ten years' imprisonment on Count 1 and to life imprisonment on Count 2. Petitioner moved for a new trial on the basis of allegedly newly discovered evidence.

The district court, after conducting a hearing which took four days, denied the motion. On appeal, petitioner's conviction was affirmed.

The government's case was based primarily on the testimony of two witnesses, Jack Soble and Johanna Beker, each of whom conspired together with petitioner to obtain and transmit national defense information to the Soviet Union. The evidence adduced at trial may be summarized as follows:

Jack Soble and his brother Robert, the petitioner,[1] were born in Lithuania in the early 1900's, and went to Germany for their higher education. While in Germany they were active in the German Communist Party, but were expelled in 1929 for Trotskyite activities (R. 10–29).[2]

---

[1] When Robert Soble was naturalized as a citizen in 1947, he added the letter "n" to his name, becoming Robert Soblen.

[2] "R." refers to the Appendix to the government's brief in the court of appeals, which is Volume II of the Record in this

In 1931, Jack Soble was summoned to the Soviet Embassy in Berlin where he was confronted by an agent of the Soviet Secret Police, then known as the GPU (later the NKVD). He was told that he must return to the Party in an undercover capacity and inform the Stalinists of Trotskyite activities. This he agreed to do (R. 30–34). When in 1933 all political activity outside the Nazi Party was prohibited in Germany, Jack Soble went to Russia and the petitioner returned to Lithuania (R. 35–36).

Near the end of 1939 Jack Soble was summoned to GPU headquarters, where he was brought before the head of the entire Soviet Secret Police, Lavrentia Beria. With Beria, along with other GPU officials, was Pjotr Fedotov, the chief of the Foreign Sector of the GPU, and Matusow, who had summoned him to GPU headquarters (R. 52–54). Beria, referring to petitioner by his old Party code name, "Roman," stated that the Soble brothers were known to the GPU as Communists. He said that Jack had worked for them abroad in the 30's and that petitioner was "an old standing Communist," a Trotskyite who had capitulated to the Party (R. 54a–55). Beria said that the GPU would like the Soble brothers to go abroad to gather "any information of any value to the Soviet Union" (R. 55, 159, 160). Beria then told Jack Soble that if he and petitioner would go abroad to work for the GPU, all of their families including relatives and

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Court. "T. Tr." and "H. Tr." refer to the transcript of petitioner's trial and hearing on his motion for a new trial, respectively. "T. Ex." and "H. Ex." refer to the exhibits introduced at the trial and hearing.

parents, would be allowed to go with them, and offered to double any sum of money that Soble's father put in a business venture so that the brothers would have a cover for spying. Jack Soble agreed to the proposition (R. 55–59, 159–161).

At the time of the Beria meeting, petitioner was in Lithuania. It was decided at the meeting that two GPU agents would go there to contact him (R. 58). In June 1940, Jack Soble returned to Lithuania, where he was met by petitioner. Petitioner told Jack that he had been approached by two agents of the GPU, Matusow and Martynov. The agents had restated the proposition made to Jack in Moscow, repeating that the brothers would go abroad and gather "any information of any value for Russia" and that they would, at the proper time, be given contacts (R. 59–61).

While in Moscow, awaiting completion of travel arrangements, Jack and petitioner attended a party given for them by the GPU. Fedotov repeated Beria's previous instructions that wherever the Sobles landed they should gather any information of any value to Russia, and instructed them that when they landed abroad, for example, in the United States, they should contact Amtorg, the Russian trade agency, through which they would be able to make contact with GPU agents (R. 73). On October 20, 1941, the two Soble brothers reached the United States, landing at San Francisco (R. 75–77).

Johanna Beker was born in Germany in 1911, the daughter of a Communist member of the German Reichstag (R. 199–200, 236). Having moved to Mos-

cow, she was approached in 1937 by the NKVD and asked to report to them concerning the activities and gossip of foreigners she knew. For almost two years, up until the time she emigrated to the United States, she continued to submit such reports (R. 201–208). In late 1938, she met, under NKVD instructions, Vassili M. Zubilin and his wife (R. 208–210).

Arriving in New York in August 1939, Mrs. Beker soon was contacted by "Johnny," *i.e.*, Mikhail Chaliapin, who had diplomatic status in the Soviet consulate (R. 214; T. Ex. 3, p. 142). Chaliapin questioned Mrs. Beker about various American acquaintances and asked her to prepare written reports for him. Thereafter, she met Chaliapin regularly and gave him reports, for which she was paid about thirty or forty dollars a month (R. 212–215). Beginning in late 1942, Mrs. Beker began to submit her reports to Mrs. Zubilin, receiving the same compensation given her by Chaliapin (R. 216–219). Zubilin was at that time Third Secretary of the Soviet Embassy in Washington (T. Ex. 141).

At this time, petitioner was living in New York. Jack Soble had moved his family from Montreal to New York in about the spring of 1942, at the direction of Zubilin (R. 82–86). Petitioner agreed to a meeting, at which Jack introduced petitioner to Zubilin. The next day petitioner told his brother that Zubilin had reminded him that he was in the United States in order to work for the Soviet Union. Thereafter, petitioner told Jack on several occasions that he was meeting Mrs. Zubilin (R. 88–89, 95). For his reports, petitioner was paid $100 to $150 a month (Pet. App. 56a).

Jack Soble met with Zubilin over a period of months after moving to New York, and then, early in 1943, Zubilin told Jack that another man, Chaliapin, would be his new contact. Chaliapin and Zubilin told Jack that he (Jack) would act as an intermediary between Chaliapin and an "old agent of the Russians who worked for them in Europe" (R. 92–93) and was now working among Trotskyite groups in America. Chaliapin introduced Jack Soble to "Mark" or "Etienne," whose real name was Mark Zborowski. Thereafter, Jack Soble continued to meet Zborowski and in turn to meet with Chaliapin (R. 90–103).

Early in 1943, Mrs. Zubilin told Jack Soble that she was petitioner's superior just as Chaliapin was Jack's superior. She said that she had given petitioner the names of a group of women who worked in the Office of Strategic Services (O.S.S.) and that through him she was getting information from this group (R. 103–105).

The O.S.S. was created June 13, 1942, by a military order signed by President Roosevelt, which provided that the O.S.S. should perform the following duties (T. Ex. 200):

> a. Collect and analyze such strategic information as may be required by the United States Joint Chiefs of Staff.
>
> b. Plan and operate such special services as may be directed by the United States Joint Chiefs of Staff.

The O.S.S. operated pursuant to this directive from its creation until it was dissolved in September 1945.

The activities of the O.S.S. and the names of its personnel (excepting the top echelon) were all considered classified matter, not available to the general public (R. 253–257).

In 1943 and 1944, petitioner and Jack Soble had various conversations concerning their work for the Soviet Union. Jack referred to his work in the Trotskyite field, and petitioner in turn told Jack that his job was to gather information through a group of people who worked in O.S.S. (R. 108–109).

One day in 1943, Jack Soble met with Zubilin, his wife, and Chaliapin. Mrs. Zubilin told Jack that petitioner would soon get a new contact because she (Mrs. Zubilin) was busy in other matters. The new contact was to be Chaliapin's wife.[3] Mrs. Zubilin also said that when this happened, they would make things even easier for petitioner by bringing in another person as a liaison between the group in O.S.S. and him. At this same meeting, Mrs. Zubilin said to Jack Soble that while petitioner transmitted to her all the material he gathered from the group in O.S.S., his comments were dry and short.

In late 1942 or early 1943, Mrs. Zubilin introduced Mrs. Beker to petitioner, whom Mrs. Zubilin said would be Mrs. Beker's new contact (R. 219–220). Mrs. Beker continued to see petitioner regularly, to submit reports to him and to receive her previous compensation—thirty or forty dollars a month—which was now given to her by petitioner (R. 220–221).

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[3] The indictment refers to Chaliapin's wife by her true name, Zoia Miakotina.

One day petitioner asked Mrs. Beker to meet Horst Baerensprung at a particular cafeteria. He described the man's physical appearance to her and how he would be dressed, that he would know Mrs. Beker's name, and that he would give her material which she was to give to petitioner (R. 221–222). Mrs. Beker met Baerensprung and he gave her an envelope containing typewritten reports. The reports concerned meetings of groups of German refugees living in the United States, and their plans for affiliation with the Communist Party and work in Germany after Hitler's defeat (R. 223). Petitioner also asked Mrs. Beker to met Hans Hirschfeld. Again a meeting place was arranged and the man was described by looks, apparel, and other details. Carrying out petitioner's instructions, Mrs. Beker met Hirschfeld and received an envelope of reports. These reports were biographical sketches of Germans and a report on German groups. This material, like the material received from Baerensprung, was delivered to petitioner (R. 223–226).

Mrs. Beker continued to meet Hirschfeld and Baerensprung from 1943 until early 1945. During this period the two men regularly gave her reports which she turned over to petitioner. Petitioner regularly gave her money to give to them (R. 226–227). According to O.S.S. personnel records, Baerensprung entered on duty for O.S.S. on June 15, 1943, as a part-time consultant and Hirschfeld became a consultant on October 8, 1943, receiving a salary of $350 per month (T. Ex. 196, 197, 199). When his services were terminated on July 31, 1945, Hirschfeld acknowl-

edged in writing his prior agreement "to keep forever secret the employment and all information obtained by reason thereof" (T. Ex. 198). Hirschfeld's reports were mainly from or about his office; he reported on interviews by some of his co-workers in O.S.S. with Germans, the latter's political leanings, and groupings that had formed among them. At times the reports named people working for O.S.S. and described their activities (R. 229–236). In the spring of 1945, the final paragraph of the last two or three reports stated that Hirschfeld had learned that the United States was working in the northwest United States on an important military project which would decide the war and was making great progress on it (R. 232–233).

In the late spring or early summer of 1945, petitioner instructed Mrs. Beker not to make any further appointments with Baerenspring or Hirschfeld. He said that she should not meet with them any longer because of events appearing in the newspapers at the time, especially those concerning the *Amerasia* case (R. 233). That case involved a leak of highly classified O.S.S. documents, which were found in the possession of the magazine *Amerasia* in the spring of 1945 (R. 259–260).

While petitioner was dealing with Mrs. Beker, his brother had received several new contacts for his work for the Soviet Union, including Boris Morros, Lucy Booker, and Floyd Miller[1] (R. 117–120, 165–

[1] Miller, testifying for the government at petitioner's trial, stated that he worked for Jack Soble in 1944, reporting on Trotskyite activities; that in early 1945 he received a new con-

171). Petitioner likewise had a number of contacts besides Mrs. Beker, including Beatrice Spitz and, after Jack Soble was instructed to turn his contacts over to his brother, Lucy Booker and Floyd Miller. These instructions were given Jack by Stephan Choudenko, who became his and petitioner's superior in late summer or early fall of 1944 (R. 105–106, 120–125).

In the spring of 1947, petitioner told Mrs. Beker that if at any time in the future she should be asked how she met him, she should say that he had been a friend of her brother's in their student years in Berlin, and that they had accidentally met on the streets in New York. None of this was true (R. 234).

Jack Soble made trips to Moscow in 1947, 1948, and 1949 (R. 130, 136, 138). On the 1947 trip, he met the two Zubilins and Fedotov (who had been at his 1940 meeting with Beria (R. 130)). They stated to Jack that they would welcome petitioner in Russia whenever he wanted to come and enlisted Jack's services in assisting Jacob Albam, a GPU agent, in falsifying an application for a tourist's visa to the United States (R. 131–133).

Jack Soble's passport had expired in 1952 and he had been unable to secure a new one. Petitioner advised Jack that it would be a good idea if he (Jack) would leave the country and reside in Europe. He advised him to obtain a lawyer and try to discover why he could not get a new passport—whether the FBI had found out about him or whether it was a formality (R. 145, 148).

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tact, petitioner, to whom he reported his attempts to get a newspaper job in Europe as a cover for espionage (R. 184–196).

In 1954 Jack Soble again met with Boris Morros, giving him letters to transmit to the Soviet Union. Included was a list of five or six names of Jack's contacts who worked for the Soviet Union. This list included Jacob Albam (under his code name "Bělova") and petitioner (under the code name "Roman") (R. 138–139).[5]

ARGUMENT

Petitioner was convicted on the basis of uncontradicted evidence. The thrust of his defense was, instead of offering any witnesses in his behalf, to attempt to bring out on cross-examination of government witnesses that any information petitioner gave the Soviets was not related to the national defense and that any such activities ceased in 1945. Under the trial court's charge (see R. 289–290, 301), the jury necessarily rejected this contention in convicting petitioner. The trial court, after a lengthy four-day hearing on petitioner's motion for a new trial, delivered an exhaustive opinion finding that the government had not suppressed evidence and that petitioner had not produced new evidence justifying a new trial. The court of appeals thoroughly examined petitioner's contentions and unanimously affirmed his conviction. We submit that there is no occasion for review.

1. Petitioner contends (Pet. 28–31) that prosecution of the conspiracy to obtain national defense in-

[5] Jack Soble, his wife, and Jacob Albam were indicted for conspiracy to commit espionage in January 1957. They pleaded guilty (R. 148–149). At the time of petitioner's trial, Jack Soble was still serving a prison term.

formation, charged in Count 1 of the indictment, was barred by the statute of limitations and that submission of this count to the jury was prejudicial error, which also affected petitioner's conviction on Count 2.

First, we submit, Count 1 was not barred by the statute of limitations. The trial court properly instructed the jury, without objection by petitioner, that in order to convict on Count 1 they must find that an overt act had been committed in pursuance of the conspiracy while petitioner was still a member after November 29, 1950 (R. 300–303). The jury's finding that such an overt act had occurred is supported by evidence showing: (1) that in 1952 petitioner advised his brother, whom he knew to be a Soviet agent and co-conspirator, to leave the United States apparently to escape detection (R. 145, 148, 302); (2) that in 1954 Jack Soble met with Boris Morros, another Soviet agent and co-conspirator, and gave Morros a list of names, apparently espionage contacts, including petitioner's code name, for transmission to the Soviet Union (R. 138–139, 302).

In any event, since petitioner was given concurrent sentences on both counts, it is well established that his conviction must be upheld if either count is valid. *E.g., Barenblatt* v. *United States*, 360 U.S. 109, 115; *Abrams* v. *United States*, 250 U.S. 616, 619; *Pierce* v. *United States*, 252 U.S. 239. There was admittedly no statute of limitations applicable to Count 2.

Moreover, there is not the slightest possibility that the evidence as to Count 1, assuming *arguendo* that that count should not have gone to the jury, could have resulted in any prejudice to petitioner. As the court

below held, petitioner "has pointed out no proof with respect to count 1 which was not equally admissible with respect to count 2 * * *. The obtaining of information for the U.S.S.R. (the conspiracy charged in count 1) was a necessary prerequisite to transmitting it (the conspiracy charged in count 2)"[6] (Pet. App. 58a).

2. Petitioner contends (Pet. 20–25) that it was prejudicial error to admit hearsay testimony relating to his own and his co-conspirators' pre-1940 and post-1945 activities. The testimony challenged is that given by co-conspirators Jack Soble, Floyd Miller, and Johanna Beker, concerning activities by them and petitioner on behalf of either the Soviet Union or the Communist Party prior to 1940 (the date the indictment charged the conspiracy started) and subsequent to 1945 (R. 123–131).

The admission of testimony concerning events which ante-date the crime is a matter for the trial court's discretion. *United States* v. *Dennis*, 183 F. 2d 201, 231 (C.A. 2), affirmed, 341 U.S. 494. The courts have upheld the introduction of evidence of this sort to show the probability that a defendant knew of the conspiracy and knowingly helped it (*Heike* v. *United States*, 227 U.S. 131, 145); the connection between future co-conspirators (*United States* v. *Crosby*,

[6] Petitioner seizes (Pet. 29–30) upon a single piece of evidence which he says was "presumably" admitted only with respect to Count 1 since it could not bear upon the charge in Count 2. That testimony, however, regarding the information about an important military project, bears upon material which the indictment charged petitioner with conspiring both to obtain and to transmit.

294 F. 2d 928, 946 (C.A. 2)); the manner in which the conspiracy came into being and its *modus operandi* (*United States v. Witt*, 215 F. 2d 580, 583 (C.A. 2), certiorari denied *sub nom. Talanker v. United States*, 348 U.S. 887); and the defendants' long-established purpose and intent (*Hodgskin v. United States*, 279 Fed. 85, 92 (C.A. 2)). And recently in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 69, this Court upheld the pertinency of evidence concerning events twenty or thirty years before to the current character of the Communist Party.

Here, the trial court admitted testimony concerning pre-1940 activities on similar grounds (R. 248–249):

> The basic reason for the admissibility of such evidence is that the Government is entitled to show the intent of the defendant and his alleged co-conspirators, the motive of the defendant and his alleged co-conspirators, and the alleged co-conspirators' community of interest and community of objectives.

When instructing (R. 15–16, 20) and charging the jury (R. 295–296), the court stressed the limited purpose for which this evidence was received, and twice in the charge cautioned the jury to avoid prejudice arising out of petitioner's pre-1940 Communist Party membership in Europe (R. 296–309). The court of appeals was clearly correct in holding that the "evidence was relevant background to the prosecution's case, to show the motivation and community of interest of the conspirators" and that there was no abuse of discretion in its admission (Pet. App. 59a).

Petitioner's attack on the admissibility of the post-1945 activities is based upon his contention that the conspiracy ended in 1945. We have seen above (pp. 11–12, 13), however, that ample evidence supported the jury's conclusion that the conspiracy continued after 1945. The trial court charged that the statements and declarations of co-conspirators could be attributed to petitioner if "made in furtherance of the conspiracy and *during the existence thereof*" (R. 287; emphasis added). As stated by the court below, "Since the jury must have found that the conspiracy continued past 1945 before it could consider the allegedly prejudicial testimony, to admit it was not error" (Pet. App. 61a).

3. Petitioner argues (Pet. 25–28) that the evidence against him was not sufficient to sustain the verdict, in that it did not show that the conspiracy was related to the procurement and transmission of information connected with the national defense. Petitioner seems not to challenge the adequacy of the evidence which established an agreement among the co-conspirators and proved his activities pursuant to that agreement, but only the evidence from which the jury inferred the "national defense" character of the information he obtained and transmitted. The court of appeals found, however, that the testimony of Mrs. Beker alone was sufficient to support the jury's finding (Pet. App. 57a). And in its totality, including the testimony of several other witnesses, the evidence is more than sufficient.

Beria and the Sobles agreed that the latter would "go abroad to work for us to gather any informa-

tion of any value to the Soviet Union" (R. 55). Clearly, this unlimited agreement included American national defense information since the record shows that the contemplated espionage activities were aimed especially at the United States (R. 56, 159–160, 73).

As to the activities performed pursuant to this agreement, the record leaves no doubt that petitioner obtained information from the Office of Strategic Services through Johanna Beker. Mrs. Beker testified that petitioner directed her to meet with Hans Hirschfeld, telling her that Hirschfeld worked for the O.S.S. (R. 223–224, 228); that, under petitioner's instructions, she received from Hirschfeld between 1943 and 1945 for transmittal to petitioner reports of interviews between O.S.S. employees and Germans, which named the O.S.S. employees involved (R. 228–233); that in 1945 the last reports given her by Hirschfeld concerned an important military project in northwest United States (R. 232). Mrs. Beker's testimony is corroborated by petitioner's admissions to his brother Jack during 1943 and 1944 that "his job was to gather information through a group of people who work in the O.S.S." (R. 108).

Even on petitioner's unsupported hypothesis that the only O.S.S. information available to Hirschfeld and Baerensprung, another of petitioner's O.S.S. contacts, was taken from public documents, the names of O.S.S. employees and the very fact that O.S.S., the United States' wartime military intelligence agency, was compiling dossiers on various Germans and German groups were themselves defense informa-

tion.[7] A high O.S.S. official testified that the names of O.S.S. personnel (excepting the top echelon), the "nature of their work, the substance of their work, the activities in which their unit was engaged" were not publicly available (R. 254–257). Thus, this case is markedly unlike *United States* v. *Heine*, 151 F. 2d 813 (C.A. 2), certiorari denied, 328 U.S. 833, in which Judge Learned Hand wrote that the statute is not offended by traffic in "information which the [armed] services have never thought it necessary to withhold at all" (*id.* at 816). Here, in contrast, the O.S.S. activities involved were carefully guarded secrets.

4. Petitioner moved in the district court for a new trial on the ground that his trial counsel were not aware of certain exculpatory facts of which, he claims, the prosecution should have informed them before or during trial. He urged that a new trial was required both in the interests of justice and on the ground of newly discovered evidence. After conducting a lengthy hearing, the district court denied the motion.

a. Petitioner asserts as newly discovered evidence the fact that Hans Hirschfeld had denied, prior to trial, Mrs. Beker's trial testimony that from 1943 until 1945 she had transmitted to petitioner from Hirschfeld information which Hirschfeld had obtained

[7] In *Gorin* v. *United States*, 312 U.S. 19, 23, the Court held that the obtaining and delivering of similar reports concerning the movements on the west coast of Japanese officials and of particular private citizens of interest to Naval Intelligence violated the predecessor statute to that involved in this case. The Court said this information would be useful to a foreign government as indicating the scope of American intelligence activities and allowing it to follow American intelligence agents. *Id.* at 29.

as a result of his position with the O.S.S. This denial was not discovered by his counsel, petitioner claims, because the government withheld from them (1) statements by Mrs. Beker describing her confrontation of Hirschfeld in the presence of F.B.I. agents and his denials of her accusations; (2) information concerning Hirschfeld's whereabouts at the time of trial; and (3) Hirschfeld's grand jury testimony concerning the confrontation.

All three of petitioner's contentions that the government suppressed evidence are without merit. First, the trial court ordered the government at petitioner's trial to produce three statements by Mrs. Beker describing the confrontation between Hirschfeld and herself (T. Ex. 169, 177, 188). Contrary to petitioner's contention, the trial court found, on the basis of evidence adduced at the motion for a new trial, that the statements had been turned over to defense counsel, including the portions of statements relative to the confrontation between Hirschfeld and Mrs. Beker (Pet. App. 7a–8a, 15a). Second, as the trial court also found in denying the motion for a new trial (Pet. App. 22a–24a), defense counsel did not attempt at any time during the trial to ascertain from the government where Hirschfeld was living and did not ask for additional time to obtain this information even though the importance of Hirschfeld as a witness was clear throughout the trial. Moreover, petitioner had no difficulty in locating Hirschfeld, who is a prominent West German citizen, soon after the trial had ended (Pet. App. 25a). Third, the transcript of Hirschfeld's grand jury testimony would not have been producible since Hirschfeld

was not a government witness. Indeed, petitioner made no request for the transcript at the trial.

b. Petitioner claims (Pet. 17, 19–20) that the government knew that other persons employed with Hirschfeld in the New York Biographical Records Unit of the O.S.S. had contradicted Mrs. Beker's testimony that Hirschfeld had secured information about the existence of a military project from his office.

The former O.S.S. employees who testified at the hearing on the motion for a new trial testified in substance, as petitioner says, that the "Biographical Records Unit had no access whatever to secret material or material of a military nature, and Dr. Hirschfeld's work in the Biographical Records Unit was to collate data obtained from the newspapers and public library" (Pet. 20). The trial court found, however, that these witnesses were all readily available to the defense during the trial and that defense counsel had deliberately chose, as a matter of professional judgment and trial strategy, not to locate and call them (Pet. App. 36a). It is well settled that allegedly newly discovered evidence is not sufficient to require a new trial when it was available during the trial to a reasonably diligent defendant (*e.g.*, *United States* v. *Costello*, 255 F. 2d 876, 879–881 (C.A. 2), certiorari denied, 357 U.S. 937; *United States* v. *On Lee*, 201 F. 2d 722, 723–724 (C.A. 2), certiorari denied, 345 U.S. 936) and was deliberately omitted by the defense as a matter of trial strategy (*e.g.*, *United States* v. *Capece*, 287 F. 2d 537, 538 (C.A. 2); *United States* v. *Costello*, *supra*; *Delbridge* v. *United States*, 262 F. 2d 710, 712 (C.A. D.C.); *Palakiko* v. *Harper*, 209 F. 2d 75, 95 (C.A. 9), certiorari denied, 347 U.S. 956).

In any event, even if the O.S.S. witnesses really constituted newly discovered evidence, the testimony was not of such a nature as to warrant a new trial. Even assuming the employees of the Biographical Records Unit generally had no official access to classified information, that would not prove that Hirschfeld could not have obtained or did not obtain the information which Mrs. Beker testified that she had received. In addition, the role which petitioner suggests Hirschfeld played as an O.S.S. employee is belied by the description which he gave the F.B.I. of his O.S.S. activities. His admissions to the F.B.I. reflect that, while employed by the O.S.S., he made several trips to Washington, some for as long as ten days, for the purpose of apprising himself of the administrative and operational functions of the O.S.S. Washington office, and for reporting and consultation (H. Ex. K, p. 10); the O.S.S. office in which he worked in New York had armed guards on the floor; he had a key to the office and the combination to the safe in which material was kept during working hours (*id.* at 16); and he briefed Allen Dulles prior to the latter's undercover wartime mission to Switzerland (*id.* at 23). Since the testimony of the O.S.S. agents would almost certainly have had no effect on the trial, petitioner, under settled principles, was not entitled to a new trial. See *Mesarosh* v. *United States*, 352 U.S. 1, 9; *United States* v. *On Lee*, *supra*; *United States* v. *Rutkin*, 208 F. 2d 647, 654 (C.A. 3).

c. Petitioner also argues that the government suppressed the medical reports on Jack Soble, who, as a co-conspirator, testified to his brother's activities in the espionage ring. In particular, petitioner emphasizes

that the government suppressed the diagnosis given by Dr. Rinsley in testifying at the earlier trial of another member of the espionage ring in *United States* v. *Zborowski*. This evidence was neither suppressed, nor newly discovered by petitioner. Petitioner was thoroughly familiar with the central facts concerning Jack Soble's psychological history, and they were brought out at the trial. The trial court found that petitioner's counsel made a calculated decision to rely on petitioner's own knowledge of Jack Soble's mental condition and therefore not to examine medical reports or other information (Pet. App. 29a–30a). We submit that this finding is fully supported by the evidence.

Petitioner at no time during the trial requested from the government any medical reports on the witness, even though he knew of Jack Soble's psychiatric history, including his treatment in federal and state institutions. In fact, petitioner, who is a psychiatrist, recommended to the psychiatrist at the federal penitentiary at Springfield, Missouri, that his brother be given shock treatment (H. Ex. G [redacted], p. 3). In addition, petitioner's counsel knew that hospital and medical records could be subpoenaed (H. Tr. 147, 149–154, 229–231). Furthermore, petitioner's counsel made no effort to follow up the statement of government counsel at the trial that Jack Soble had testified earlier at the *Zborowski* trial and that this testimony was readily available (T. Tr. 508, 510–511).* Indeed,

* The judge cited at the trial in this case the court of appeals' reported opinion in *Zborowski* (271 F. 2d 661, 667) (C.A. 2), which specifically stated that defense counsel in that case had available, and extensively used on cross-examination, medical reports on Jack Soble at federal and state institutions (see Pet. App. 31a).

petitioner's counsel admitted that he intentionally refrained from reading Jack Soble's testimony at the other trial (H. Tr. 143–144, 156–158). This testimony would have identified most of the medical reports which petitioner later claimed were newly discovered evidence (*id.* at 143–144, 225–226, 228–229).

Petitioner's counsel thus did not pursue the obvious leads to further information concerning his brother's mental condition. Counsel specifically stated at the hearing on a motion for a new trial that the reason they did not pursue these leads was that they had made a deliberate decision to rely on the knowledge possessed by petitioner himself of his brother's mental condition (H. Tr. 139–140, 156, 228). Using this information, petitioner's counsel exhaustively cross-examined Jack Soble at the trial. Soble admitted that he had had a mental condition for several years; that he had deliberately swallowed nuts and bolts while confined in Lewisburg Penitentiary in 1958; that after suffering a breakdown in a New York jail, he had been sent in 1957 to Bellevue Hospital for psychiatric observation in order to determine his mental competence to plead to the espionage indictment against him; and that he had received twenty shock treatments in 1958 and 1959 in the federal penitentiary at Springfield, Missouri (T. Tr. 589–598). As a result of this cross-examination, defense counsel argued Jack Soble's mental condition to the jury in summation (T. Tr. 1509–1510, 1514), and the court charged the jury specifically on the issue raised by defense counsel's claim "that Jack Soble was utterly irresponsible, perjurious, and mentally incompetent" (T. Tr. 1609). The jury having, apparently, credited

Jack Soble's testimony despite his mental condition, petitioner cannot obtain a new trial because he desires to try a new strategy.

Petitioner, however, contends that, even though he had access to Jack Soble's medical records and deliberately decided not to use them, the government had an affirmative duty to disclose a medical diagnosis made of Soble in 1958. This diagnosis given by Dr. Donald B. Rinsley in testimony in *United States* v. *Zborowski* was that Soble had a "moderate to severe" mental illness, that he had a deficient memory, and that he is "at times * * * capable of filling in his gaps in memory with information which he believes to be true but which may not be true" (H. Ex. D, p. 914; H. Tr. 258, 261). We submit, however, that the government's obligation to be assured of the truth of the testimony it expected to elicit from Jack Soble was fully satisfied, and that therefore the government was justified in making the prosecutive judgment to present Jack Soble to the jury as a credible witness.

First, the record shows that, subsequent to Dr. Rinsley's diagnosis and before the trial, Jack Soble's mental condition was substantially improved and that he had been determined by psychiatrists to be a competent witness (H. Ex. E, V). Second, even aside from this later diagnosis of Soble's condition, Dr. Rinsley's own testimony would not have precluded the government from using Soble as a witness in this case. Dr. Rinsley's testimony in the *Zborowski* case was that Jack Soble was "capable" of fabricating rather than under a compulsion to fabricate, that this happens "at times" rather than always, and that this

capability asserted itself only when there were memory gaps rather than at random. The actual report which Dr. Rinsley made on Soble, from which he refreshed his recollection while testifying, does not mention Soble's capability to fabricate but it does state that Jack "revealed an excellent general fund of information, some impairment of recent memory, intact remote memory * * *" (H. Ex. G, p. 3). Dr. Rinsley further testified on direct examination in *Zborowski* that "probably the determination of whether anything he [Jack Soble] said was true or not true would have to rest upon essentially the same standards that you [defense counsel] might use or that the jury would have to use. * * * For any specific or particular statement I would have to say that I would not have any claim to making a better judgment [as to the truth or falsity of a statement] than you might or someone else might" (H. Tr. 259). Dr. Rinsley said that the jurors could "most definitely" determine whether Soble was telling the truth (H. Tr. 261–262). In short, while Jack Soble's mental history required that the government proceed with care in accepting his account of events, it did not require that the government decline to use him as a witness.

Once the government determined to use Soble as a witness, after comparing his story with other available information and deciding that his proposed testimony was accurate, there was no obligation to disclose any psychiatric report which cast some doubt on his accuracy. The cases cited by petitioner (Pet. 18–19) all concern the withholding of contradictory material facts or a contradictory witness, *i.e.*, exculpatory evi-

dence, or the positive misrepresentation of evidentiary facts. We know of no cases which hold that the government—with no person or facts contradicting the witness' story and with corroborative evidence giving good reason to credit it—must disclose all the information not in the nature of evidence, which might be useful for cross-examination. This is particularly true where, as in this case, the basic facts were all known to the defendant and his counsel and they deliberately chose not to pursue the information.[9]

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[9] Petitioner includes (Pet. 4) in his Questions Presented three issues which he does not argue: whether petitioner was deprived of his constitutional rights by denial of an adjournment upon the entry of newly-retained counsel into the case, by denial of his motion to take the case off the calendar on the ground that he was not able physically to stand trial, and by denial of his request for an adjournment so that he might decide whether to testify in his own behalf. Not one of these issues was raised in the court below. In addition, all are completely without merit since in all these instances, the district court properly exercised its discretion.

1. The morning that trial was scheduled to start, July 19, 1961, Joseph Brill entered an appearance and stated to the court that he had been retained as petitioner's trial counsel that morning. Petitioner had been represented by Jacob Friedman since December 22, 1960, shortly after his arraignment. The court denied Mr. Brill's request for a delay in the trial, since it was petitioner who had been pressing for an early trial and since Mr. Friedman was remaining to assist Mr. Brill (T. Tr. 2-11).

2. On June 15 and 16, 1961, the district court held an extensive hearing on petitioner's ability to stand trial. (We have obtained from the court reporter and lodged with this Court a certified transcript of this hearing and the eleven exhibits received, since, as the petition notes, this transcript is missing from the files of the district court.) Prior to June 15, petitioner had been insistent on going to trial. His attorneys stated on May 29, in response to the Assistant United States Attorney's request for a medical examination, that petitioner was willing to go on trial regardless of a physician's findings. (Proceedings

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1962.

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of May 29, 1961, p. 4). At the June hearing, the government offered testimony from a hematologist who had examined petitioner on March 1 (Ex. 3), and June 12 (Ex. 4), 1961, the director of a health center which had employed petitioner in a limited capacity from May 18 to June 12, 1961, and an expert in pharmacology; petitioner likewise testified at the hearing (Proceedings of June 15 and 16, 1961, pp. 16–174). Upon this evidence, the district court ruled that petitioner was able, physically and mentally, to stand trial (*id.* 175–181).

3. The government notified the defense shortly after 10:30 a.m. on July 10 that the government expected to rest "in a day or two" (T. Tr. 1361). The government rested a day later (T. Tr. 1426). After an hour was spent in the argument of motions, the court granted a recess to permit defense counsel to formulate their plans (T. Tr. 1465). Defense counsel returned from this recess to ask the court for an overnight adjournment so that petitioner might decide whether or not to take the stand. The court refused to grant an adjournment of that length, but permitted petitioner and his counsel a further and unlimited opportunity at that time to arrive at a decision. When they returned from their discussion, defense counsel stated that petitioner, although protesting that he had not received sufficient time to decide, would not take the stand (T. Tr. 1466–1471). Counsel then volunteered for the record that they had recommended this decision to petitioner and that they felt that the court had "granted a great deal of courtesy to the defendant" (T. Tr. 1475).

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IN THE

Supreme Court of the United States

October Term, 1961

No. 957

ROBERT SOBLEN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Interest of *Amicus*

The American Civil Liberties Union, which files this brief with the consent of both parties, is a non-profit, non-partisan organization engaged solely in the defense of the Bill of Rights. The issue with which we are specially concerned in this case is the extent of the responsibility of attorneys for the United States, within the bounds of our adversary system of justice, to bring all relevant evidence to the attention of the trier of facts in a capital case.

We believe that, under the circumstances of this case, the government, by failing to bring forward crucial evidence bearing on the credibility of its principal witness, of which it had knowledge, deprived petitioner of due process of law. In the alternative, if the error was not of constitu-

tional stature, it was, at the very least, so serious that it deserves to be corrected by this Court in its supervisory capacity over the federal courts. Unless certiorari is granted and the question presented here thoroughly briefed and argued, a vital issue relating to the administration of justice in the federal courts will continue unresolved.

Question Presented

Whether the constitutional demands of due process required the government in submitting the testimony of Jack Soble, its principal witness (and petitioner's brother), to inform the jury that Soble was suffering from a progressive organic brain disease that substantially affected his memory, and that he suffered in addition from a serious psychiatric disorder.

Statement of Facts[1]

Petitioner, an American citizen, was indicted November 29, 1960, by a federal grand jury in the Southern District of New York. The first count of the indictment charged a conspiracy to obtain information relating to the national defense of the United States. The second count alleged a conspiracy to transmit such information to the Soviet Union. Petitioner was convicted on both counts by a jury and sentenced to terms of ten years and life imprisonment respectively.

One of the two chief witnesses against petitioner was his brother, Jack Soble, who had himself been charged with conspiracy to commit espionage in 1957. Soble pleaded guilty to the charge and was serving his sentence at the

[1] Because this brief is confined to the first question presented in the petition for certiorari, the statement of facts deals only with the facts of the case which are necessary for consideration of that question.

time of his appearance as a government witness against petitioner. He remains imprisoned at the present time.

At the trial the defense knew, or discovered on cross-examination, certain facts relating to Soble's mental condition. Those facts were that Soble attempted suicide in 1958 by swallowing a large quantity of nuts and bolts, that he had been under observation at Bellevue Hospital in 1957, and that he was given twenty electric shock treatments at the Medical Center for Federal Prisoners in 1958 and 1959 (R. 591-98). After trial, the defense learned that Soble had testified in 1958 in a criminal proceeding in the Southern District of New York. *United States* v. *Zborowski*, 271 F. 2d 661 (2d Cir. 1959). Expert testimony of a staff psychiatrist at the Medical Center for Federal Prisoners, where Soble was confined, was adduced at the *Zborowski* trial bearing on his testimonial competence. That testimony revealed that Soble had two illnesses, "one was his severe depression and the other was the impairment which he suffered as a result of his having organic brain disease itself" (NT. 257)[2]; that "at times because of a deficiency in memory and because of the nature of his mental illness, he is capable of filling in gaps in memory with information which he believes to be true but which may not be true" (NT. 258); that "Mr. Soble's mental illness is of the moderate to severe degree, and if I may, if we have the scale to zero to 10 and 10 is the worst, if you will, and zero is the least, I would place him about 7, perhaps, 7½, perhaps 8. In other words, he is well along on this seriously ill side. He is much more seriously ill than he realizes." (NT. 261); and that Soble's illness "reaches * * * into every department of an individual's function, his thinking, his emotions, his judgment, in varying degrees and at different times" (NT. 263).

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[2] "NT." refers to the transcript of the hearing held in the District Court on the motion for a new trial.

This information, which would have critically borne upon the jury's evaluation of Soble's credibility, was necessarily known to the government before petitioner's trial but was not known to the defense until after the completion of the trial (NT. 140-41, 143-44). Nevertheless, on petitioner's motion for a new trial, the trial judge concluded that under the circumstances of this case (App. 29a-33a), the evidence in question could have been discovered by the defense if it had exercised due diligence and that a new trial was therefore not warranted. That judgment was affirmed by the Court of Appeals. *Soblen v. United States*, 301 F. 2d 236 (2d Cir. 1962).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals that the Government was not obligated to come forward with information that its principal witness was suffering from a brain disease that substantially impaired his memory, and therefore his credibility, raises an issue of importance to the administration of justice in the federal courts which should be, but has not been, passed upon by this Court.

It is well established that the prosecutor in a criminal case is subject to certain obligations which, if not fulfilled, will lead to the setting aside of a conviction. One group of cases concerns perjured testimony. If the Government knowingly uses such evidence, a conviction obviously cannot stand under the Fourteenth Amendment. *E.g., Alcorta v. Texas*, 355 U. S. 28 (1957). This rule has recently been applied in a case where the defense's impeachment of a prosecution witness was hindered by the perjured testimony. *Napue v. Illinois*, 360 U. S. 264 (1959).

* "App." refers to the Appendix filed with the petition for certiorari.

It is also clear that the Supreme Court, relying on its supervisory power over the federal courts, will not let a conviction stand if perjurious testimony that is not "insignificant" is adduced by the prosecution even if it is not shown that Government lawyers knew of the perjury. *Mesarosh* v. *United States*, 352 U. S. 1, 10-11 (1956).

A second group of cases recognizes that "willful" suppression by the prosecution of evidence "favorable to defendant" constitutes a denial of due process. *Pyle* v. *Kansas*, 317 U. S. 213 (1942) (alternative holding); *United States* v. *Dye*, 221 F. 2d 763 (3d Cir.), cert. denied 350 U. S. 875 (1955); see *Barnes* v. *Leycff*, 202 F. 2d 335, 338 (D. C. Cir. 1952), aff'd *sub nom. Barnes* v. *Wilson*, 346 U. S. 137 (1953); *Woollomes* v. *Heinze*, 198 F. 2d 577, 579 (9th Cir. 1952), cert. denied, 344 U. S. 929 (1953).

Finally, there are cases in which convictions have been overturned by appellate courts employing their supervisory power over federal trials, where the prosecution by no stretch of the imagination could be said to have acted "wilfully". Thus, the Court of Appeals for the Second Circuit recently held that a new trial was required where the Government *negligently* failed to disclose evidence that was "highly relevant" to the impeachment of the chief prosecution witness and of "obvious benefit" to the defense. *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563 (2d Cir. 1961). See also *Arbuckle* v. *United States*, 146 F. 2d 957 (D. C. Cir. 1944); cf. *Delbridge* v. *United States*, 262 F. 2d 746 (D. C. Cir. 1958); *United States* v. *Heath*, 147 F. Supp. 877 (D. C. D. Hawaii 1957), appeal dismissed, 260 F. 2d 623 (9th Cir. 1958).

The full extent of the obligation of government prosecutors to disclose information of value to the defense is, as the above cases demonstrate, a recurring question in the federal courts on which this Court has never ruled. It should do so in order to provide necessary guidance for the conduct of federal trials.

2. The decision of the court below was incorrect because it failed to recognize the independent obligation of the prosecution, at least in a capital case, to disclose facts within its possession which severely impaired the credibility of its principal witness.

As pointed out above, it is well established that willful failure by the Government to disclose to the trier of facts evidence favorable to defendant will result in the setting aside of a conviction. In this case there is no dispute over the facts relating to Soble's mental disease and there can be no doubt that the prosecution's suppression of the expert testimony by the prison psychiatrist was "willful". This is so because the Government, at the time it prepared for trial, must have recognized the bearing of the medical evidence on the jury's acceptance of Soble's testimony.

The facts adduced at the trial in *United States* v. *Zborowski*, supra, make this plain. It is obvious that a jury would want to weigh Soble's words in light of the fact that "he is capable of filling in gaps in memory with information which he believes to be true but which may not be true" (NT. 258); that "He is much more seriously ill than he realizes" (NT. 261); and that this illness "reaches • • • into every department of an individual's function, his thinking, his emotions, his judgment • • • " (NT. 263).

The Court of Appeals in this case recognized the existence of the burden on the prosecution with respect to exculpatory facts within its exclusive control, but ruled that the burden did not exist when the facts are readily available to a "diligent defender" (App. 62a).

This ruling misconceives the nature of the duty on the public prosecutor. The obligation does not depend on the ability or diligence of the particular defense counsel that happen to confront the Government in a given criminal trial. It is an *independent* duty that the prosecution carries

as an intimate part of its function as representative of the state. It is always possible to argue that greater diligence on the part of defense counsel would have unearthed the truth. This argument reduced to its simplest terms, is no more than a means of watering down the prosecutor's obligation.

The principle that lack of diligence by defense counsel in no way qualifies the prosecution's independent duty to produce evidence of critical value to the defendant is being increasingly recognized. Thus, in *Delbridge v. United States, supra*, the court appreciated that counsel for the defendant should have known of the existence of a newspaper article that contained information of great value to the defense. Nevertheless, it reversed the decision of the District Court that denied defendant's motion for a new trial after the article ultimately came to light.

Similarly, in the New York case of *People v. Hoffner*, 208 Misc. 117, 129 N. Y. S. 2d 833 (Queens County Ct. 1952), the court set aside a conviction for murder on the ground that the district attorney had the affirmative duty to produce a stenographic record of what transpired at a police lineup which contained evidence contradicting the testimony of the State's key witness. The court explicitly stated that it was "convinced" that defense counsel "should have known that a stenographer recorded the proceedings of the lineup and that a transcript was in existence at the time of trial."

The independent obligation on the prosecutor to bring forward evidence favorable to the defendant is recognized by the most comprehensive law review discussion of the issue. In Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 Colum. L. Rev. 858, 861 (1960), it is stated:

> "* * * that a diligent defense counsel could have discovered the evidence, or that the prosecutor, hon-

> estly doubted the admissibility or reliability of the undisclosed information does not preclude reversal, because the attention of the court is focused solely on the probable accuracy of the judgment and not on the competency or intent of either counsel."

The independent obligation of the prosecution to produce evidence favorable to the defendant, irrespective of the quality of defense counsel, is but another aspect of the rule that basic rights should not be forfeited because of a lawyer's misstep. *E.g., Conley v. Gibson*, 355 U. S. 41, 47-48 (1957).

For these reasons, the Court of Appeals erred in refusing to order a new trial at which Soble's testimony could be properly evaluated by the jury in light of the medical testimony bearing on his credibility.

3. The present case is particularly suitable for this Court to determine the minimal duty of disclosure resting on the prosecution.

The court is not being asked to review an ambiguous record or a record raising factual or collateral questions. On the contrary, the issue of the extent of the prosecution's duty to disclose is sharply presented here in a capital case.

In the first place, it is clear that Soble was the principal witness for the Government and that his testimony was instrumental to the case against his brother. Secondly, as the *Zborowski* case shows, there can be no doubt that the full facts relating to Soble's mental condition would have been of major importance to the defense as a basis for impeaching his testimony. Finally, whether the Government's failure to proffer the medical records within its possession be denominated "willful", "reckless", or something else, there is no issue here as to its awareness at the time of trial of the importance to the defense of the information relating to Soble's severe mental illness. The

issue of the prosecution's responsibility is thus focused more clearly than in many of the cases in which a new trial has been ordered. *E.g., United States v. Consolidated Laundries Corp., supra; Arbuckle v. United States, supra.*

Conclusion

The Court should review the decision of the Court of Appeals because the question of the duty of the prosecution to proffer evidence within its possession that is favorable to defendant is an important one for the administration of justice in the federal courts, has never been clarified by this Court, was wrongfully decided below, and is particularly meet for decision in this case.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted.

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